

No. 15078

United States
Court of Appeals
for the Ninth Circuit

CRISTOBAL C. HINES,

Appellant,

vs.

JOAQUIN A. PEREZ,

Appellee.

Transcript of Record

FILE

JUL -6 1956

Appeal from the District Court of Guam
Territory of Guam.

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Agana, Guam;

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625 Market St.,
San Francisco, Calif.,

For the Appellant.

TURNER & STEVENS,

Aflague Bldg.,
Agana, Guam;

SPIEGEL, TURNER & STEVENS,

613 Wilshire Blvd.,
Santa Monica, Calif.,

For the Appellee.

District Court of Guam, Territory of Guam

Civil No. 27-55

JOAQUIN A. PEREZ,

Plaintiff,

vs.

CRISTOBAL HINES,

Defendant.

COMPLAINT TO RECOVER ON CONTRACT

Comes now the plaintiff and for cause of action against defendant alleges:

1. Jurisdiction over this action is vested in this Court by the Organic Act of Guam and Public Law 17, First Guam Legislature, as amended. The amount in controversy exceeds the sum of Two Thousand Dollars.

2. On the 29th day of September, 1952, plaintiff and defendant entered into a written agreement whereby plaintiff sold, transferred, and delivered to defendant twenty-five (25) shares of capital stock of Island Service Company, Inc., a Guam corporation, at the actual value of such shares to be as determined in accordance with the provisions of said contract of September 29, 1952, a copy of which is attached hereto marked Exhibit "A" and incorporated herein by reference.

3. Pursuant to the provisions of said contract, Ireneo Viray and Stanley Kaneshiro conducted an audit of the books and records of said Island Serv-

ice Company, Inc., from the inception thereof to and including October 1, 1952, and Sherwood Wiseman, pursuant to the provisions of said contract, reconciled the differences arising from said audit by Viray and Kaneshiro, and pursuant to the provisions of said contract determined that the actual value of the capital shares of Island Service Company, Inc., was \$163,070.31, of which \$60,000.00 constituted paid-in capital and \$103,070.31 constituted earned surplus.

4. The actual value of plaintiff's shares of stock pursuant to said contract of September 29, 1952, is \$40,767.57.

5. Plaintiff has demanded of defendant the payment of the purchase price of said shares, but defendant has refused and failed and still refuses and fails to pay said purchase price, to defendant's damage in the sum of \$40,767.57.

Wherefore, plaintiff demands judgment against defendant in the sum of \$40,767.57, for costs of suit, and for such other and further relief as the Court may deem just.

Dated: Agana, Guam, April 19, 1955.

TURNER & STEVENS,

By /s/ RUSSELL L. STEVENS,
Attorney for Plaintiff.

EXHIBIT "A"

Agreement

This agreement, made and entered into this 29th day of September, 1952, by and between Cristobal C. Hines, Party of the First Part, hereinafter referred to as Hines, and Joaquin A. Perez, Party of the Second Part, hereinafter referred to as Perez;

Witnesseth:

Whereas, Perez is the owner of twenty-five (25) shares of stock of Island Service Company, Inc., a Guam corporation, which stock has a par value of Six Hundred Dollars (\$600.00) per share; and

Whereas, Perez has agreed to sell said shares to Hines as hereinafter provided;

Now, Therefore, in consideration of the premises and the covenants and conditions hereinafter contained, it is agreed by and between the parties hereto as follows:

1. Perez covenants and agrees to sell and does hereby sell and transfer the said shares of stock to Hines.

2. Hines covenants and agrees to pay for said shares the "actual value" thereof as of October 1, 1952.

3. The term "actual value" as used herein shall be determined as follows:

(a) Hines hereby designates Ireneo Viray, and Perez hereby designates Stanley Kaneshiro, which

two individuals will jointly audit the books and records of Island Service Company, Inc., from the inception thereof, to and including October 1, 1952. After said joint audit has been completed, Robert Wiseman shall review said audit and shall attempt to reconcile any differences that may have arisen therein. After such review the results of said audit shall be presented to Crain and Phelan and Lyle H. Turner, the attorneys for the respective parties. In the event any difference of opinion should result between said counsel as a result of said audit, either party hereto shall have the right to take said difference of opinion into any Court with jurisdiction thereof in order that said difference may be resolved. Any such recourse to Court will be limited to resolving any difference that the parties hereto have been unable to resolve.

3. (b) Accounts receivable shall be evaluated in accordance with standard accounting methods as said accountants and auditor may agree upon by majority vote. In reaching said determination said accountants shall use a standard accountants' handbook accepted by the American Society of Accountants, or a like national society.

(c) The stock in trade shall be listed at the actual cost to the corporation delivered in the warehouse of the corporation.

(d) Fixtures attached to the realty, excluding mechanical contrivances, shall be valued at cost to the corporation, depreciated to October 1, 1952, which depreciation shall be over the period of the

lease of the corporation of the premises upon which the corporation is located, or the period of amortization allowed by the income tax regulations of the Federal Government, as modified for the Territory of Guam, whichever period shall be shorter. In the event of any dispute or difference of opinion regarding the period of amortization allowed under local income tax regulations, the determination of the tax commissioner of the Government of Guam will be accepted.

(e) All other fixtures, including rolling stock, mechanical fixtures attached to realty, etc., shall be valued at their actual value as of October 1, 1952. For the purpose of determining said actual value, Perez shall select an appraiser, and does hereby select Jack Lathrop, subject to the right to substitute another appraiser in the event said Jack Lathrop does not agree to act as appraiser or is otherwise unavailable, and Hines shall designate an appraiser on or before Friday, October 3, 1952. In the event said two appraisers are unable to agree upon the value of any asset, as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final.

(f) All other assets and liabilities shall be determined by standard accounting methods as set forth in *The Accountants' Handbook*, or some other standard accounting manual recognized and approved by the American Society of Accountants, or some other like national society.

3. (g) There shall be included in determining the "actual value" of the corporation the capital invested in the business, which is agreed to have been Sixty Thousand Dollars (\$60,000.00) at the inception of the corporation.

4. After said "actual value" of the corporation has been determined, Hines shall pay to Perez, within thirty (30) days after the execution of this agreement, or within fifteen (15) days after said determination of the "actual value" of said corporation, whichever shall be later, twenty-five per cent (25%) of said "actual value," payment to be made as follows: the sum of Fifteen Thousand Dollars (\$15,000.00), providing said twenty-five per cent (25%) of the "actual value" equals or exceeds the sum of Fifteen Thousand Dollars (\$15,000.00); provided, however, that if said twenty-five per cent (25%) is less than Fifteen Thousand Dollars (\$15,000.00), Hines shall pay the amount of said twenty-five per cent (25%). In the event that said twenty-five per cent (25%) exceeds the sum of Fifteen Thousand Dollars (\$15,000.00), the amount in excess of Fifteen Thousand Dollars (\$15,000.00) shall be paid as follows: in twelve (12) equal installments, commencing ninety (90) days after said initial payment of Fifteen Thousand Dollars (\$15,000.00) is due and payable.

5. Perez shall endorse in blank and deliver to Hines the share certificate evidencing the fact that he is the owner of the foregoing shares of stock, when the following has been accomplished: the

Board of Directors and shareholders of the corporation have ratified an agreement between the corporation and Perez, which agreement has been drawn up of even date herewith and signed by Perez, it being understood and agreed that said Board of Directors and shareholders shall meet on September 30, 1952, for the purpose of ratifying said agreement.

In Witness Whereof, the parties hereto have set their hands in Agana, Guam, on the day and year first above written.

/s/ CRISTOBAL C. HINES,

/s/ JOAQUIN A. PEREZ.

In the presence of:

/s/ VIRGINIA A. CRAIN.

[Endorsed]: Filed April 19, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To Joaquin A. Perez, and Spiegel, Turner & Stevens, his attorneys:

Please take notice that the defendant will move this Court at the Guam Congress Building, Agana, Guam, on Friday, the 10th day of June, 1955, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing

the above-captioned case for failure to state a claim upon which relief can be granted.

/s/ E. R. CRAIN,

Attorney for Defendant.

[Endorsed]: Filed May 31, 1955.

District Court of Guam, Territory of Guam
Civil No. 27-55

JOAQUIN A. PEREZ, Plaintiff,

vs.

CRISTOBAL C. HINES, Defendant.

ANSWER

Comes now the defendant and answers the complaint on file herein as follows:

First Defense

The complaint on file herein fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant denies each and every allegation contained in said complaint.

Wherefore, defendant prays that plaintiff's complaint be dismissed and that defendant have his costs expended herein.

/s/ E. R. CRAIN,

Attorney for Defendant.

[Endorsed]: Filed July 18, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

I. Pleadings:

The plaintiff filed his complaint under date of April 19, 1955, in which he alleged that under date of September 29, 1952, plaintiff and defendant entered into a written contract for the sale of 25 shares of capital stock of the Island Service Company, Inc., a Guam corporation. The value of such shares was to be determined in accordance with the terms of the contract. The plaintiff alleges that audits were made of the corporate assets in accordance with the contract and that the value of the 25 shares is \$40,767.57, for which judgment is prayed.

The defendant answered and for a first defense alleged that the complaint did not state a cause of action, and for a second defense the defendant denied each and every allegation contained in the complaint.

II. Conference:

At the pretrial conference plaintiff contended that in accordance with the terms of the written agreement audits had been made and reconciled; that appraisals had been made of equipment; and that the book value of the stock in question is the amount alleged.

The defendant contended that the terms of the agreement had not been complied with and that

there was no satisfactory determination of the book value of the stock.

III. Witnesses for Plaintiff:

1. Spencer M. Forkner will testify as to his appraisal of equipment, the value of which is in dispute.

2. Walker Lathrop will testify by deposition as to his appraisal of the value of equipment in dispute and as to the joint selection of James Norris as a third appraiser.

3. James Norris will testify as to his appraisal of the equipment in dispute.

4. Stanley Kaneshiro will testify as to his audit of corporate assets as of October 1, 1952.

5. Ireneo Viray will testify as to his audit of corporate assets as of the same date.

6. Sherwood Wiseman will testify as to his reconciliation of differences appearing in the audits.

IV. Witnesses for Defendant:

1. Henry Schwendinger will testify that he was employed to make an appraisal of the equipment and the results of his appraisal. He will testify by deposition.

2. Ireneo Viray will testify as to his audit.

3. The defendant will testify as to the methods of making the audit and the appraisals.

4. Spencer M. Forkner will testify as to the methods of appraisal.

V. Stipulations:

The parties stipulated as follows:

1. The contract attached to the complaint is a true and correct copy of the original contract.

2. The parties have been unable to reconcile their differences and the entire contract is in dispute.

3. Either party may call additional witnesses by giving the other party notice five days in advance of trial of the names of such witnesses and the testimony to be given.

4. The parties stipulate that the action is to be tried to the Court without a jury.

VI. Order: It is Herewith Ordered:

1. The stipulations entered into by the parties are approved.

2. This action is set for trial October 17, 1955, at 9:30 a.m.

Dated and entered this 30th day of August, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

Approved:

/s/ LYLE H. TURNER,
Attorney for Plaintiff.

/s/ E. R. CRAIN,
Attorney for Defendant.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Cristobal C. Hines, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 26th day of October, 1955.

Dated this 9th day of November, 1955.

/s/ E. R. CRAIN,
Attorney for Appellant.

[Endorsed]: Filed November 9, 1955.

[Title of District Court and Cause.]

MOTION FOR SETTLEMENT OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Counsel for Plaintiff and Defendant having been unable to agree to the form of the Findings of Fact,

Conclusions of Law and Judgment to be filed and entered in the above-entitled cause, Plaintiff moves the Court to settle the Findings of Fact, Conclusions of Law and Judgment to be filed and entered herein.

Dated: November 23, 1955.

TURNER & STEVENS,
Attorneys for Plaintiff.

By /s/ LYLE H. TURNER.

[Endorsed]: Filed November 23, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried by this Court without a jury, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. On the 29th day of September, 1952, plaintiff and defendant entered into a written agreement whereby plaintiff sold to defendant twenty-five (25) shares of capital stock of Island Service Company, Inc., a Guam corporation, hereinafter referred to as corporation, said stock having a par value of Six Hundred Dollars (\$600) per share, the share so sold constituting twenty-five per cent (25%) of the subscribed shares of said corporation. Pursuant

to said contract, plaintiff endorsed his share certificate representing his twenty-five (25) shares in blank and delivered the same to the defendant, through Finton J. Phelan, Jr., the then attorney for defendant.

2. Said agreement of September 29, 1952, provided that the plaintiff should receive from defendant the "actual value" of such shares as of October 1, 1952, the said value to be determined by a joint audit of the books and records of corporation from the inception thereof, November 9, 1950, to and including October 1, 1952, and for the purpose of making such the plaintiff designated Stanley Kaneshiro as his representative and the defendant designated Ireneo Viray, as his representative.

3. After the completion of the joint audit, Sherwood Wiseman was designated by the parties as the person to review the joint audit and to attempt to reconcile any differences that might have arisen between the auditors. After such review the result of the audit was to be presented to Crain & Phelan, attorneys for defendant, and Lyle H. Turner, attorney for plaintiff. In the event any differences of opinion should result between counsel as a result of said audit, either party would have the right to take said difference of opinion to any court having jurisdiction to resolve the differences. Subsequent to the execution of the agreement the law firm of Crain & Phelan was dissolved and thereafter E. R. Crain acted solely as counsel for defendant.

4. In determining the "actual value" of plaintiff's shares, accounts receivable were to be evaluated in accordance with standard accounting methods as the accountants and auditor might agree upon by majority vote; the stock in trade was to be listed at actual cost to the corporation, delivered to the warehouse of the corporation; fixtures attached to the realty, excluding mechanical contrivances, were to be valued at cost to the corporation, depreciated to October 1, 1952, the depreciation to be over the period of the lease of the corporation of the premises where corporation was located, or the period of amortization allowed by the Federal income tax regulations, as modified for the Territory of Guam, whichever period was shorter. In the event of any dispute or differences of opinion regarding the period of amortization allowed under local income tax regulations, the determination of the tax commissioner of the Government of Guam, was to be accepted; all other fixtures, including rolling stock, mechanical fixtures attached to the realty, etc., were to be valued at their actual value as of October 1, 1952, to be determined by two appraisers, Walter Lathrop being the appraiser designated by the plaintiff and the defendant designating an appraiser by October 1, 1952. The defendant first designated Peter Sgro, and subsequently substituted Spencer M. Forkner. If the two appraisers were unable to agree upon the value of any of such asset, they were to select a third appraiser whose decision on the value of said assets was to be final; all other assets and liabilities were to be

determined by standard accounting methods as set forth in *The Accountants' Handbook*, or some other standard accounting manual recognized and approved by the American Society of Accountants, or some other like national society; in determining the actual value of the corporation, it was agreed that the capital investment was Sixty Thousand Dollars (\$60,000) at the inception of the corporation.

5. Said agreement provided that all fixtures, other than mechanical fixtures attached to the realty, were to be valued at their actual value as determined by two appraisers, and defendant selected Spencer M. Forkner and plaintiff selected Walter Lathrop, as their respective appraisers. In the event said appraisers were unable to agree upon the value of any assets as of October, 1952, the contract provided the two appraisers were to select a third appraiser whose decision on the value of the assets to be appraised was to be final. Spencer M. Forkner appraised the value of said assets to be \$22,349.00 and Walter Lathrop appraised the value of said assets as \$41,036.00; thereafter said two appraisers appointed James Norris as the third appraiser and he appraised the value of said assets as \$34,391.00 and the Court finds the value of said appraised assets to be \$34,391.00 in accordance with the appraisal of said James Norris.

6. Ireneo Viray and Stanley Kaneshiro audited the books and records of the corporation and Viray determined the actual value of the corporation to be Seventy-Nine Thousand Six Hundred One Dol-

lars and Ninety-One Cents (\$79,601.91) and Kaneshiro determined the actual value to be One Hundred Twenty-One Thousand Two Hundred Twenty-Eight Dollars and Sixty-Seven Cents (\$121,228.67).

After discussions with Sherwood Wiseman, the two accountants agreed to certain adjustments to their computations to be made by Wiseman, and as a result of said adjustments, Wiseman determined the actual value of the corporate shares as determined by Viray to be One Hundred Fifty-Five Thousand Six Hundred Twenty-Five Dollars and Ninety-Five Cents (\$155,625.95) and by Kaneshiro to be One Hundred Fifty-Two Thousand Eight Hundred Thirty-Three Dollars and Two Cents (\$152,833.02).

7. Counsel for plaintiff and defendant agreed that the respective counsel for the two parties were unable to reconcile the differences upon the actual value of the corporation and that the entire contract was in dispute.

8. The Court finds the following to be the assets and liabilities of corporation as of October 1, 1952:

| | |
|---|--------------|
| Cash on hand and in bank | \$ 20,047.40 |
| Notes receivable | 850.00 |
| Accounts receivable, after deducting bad debts | 53,548.74 |
| Inventory—merchandise | 48,506.65 |
| Inventory—new cars | 11,489.33 |
| <hr/> | |
| Total current assets | \$134,442.12 |

Fixed Assets:

| | |
|------------------------------|--------------|
| Buildings | \$ 21,616.59 |
| Office equipment | 188.75 |
| Furniture and fixtures | 736.58 |
| Heavy equipment | 34,391.00 |
| <hr/> | |
| Total fixed assets | \$ 56,932.92 |
| Merchandise in transit | \$ 34,489.64 |

Other:

| | |
|--------------------------|---------------------|
| Prepaid insurance ..\$ | 728.44 |
| Prepaid expenses .. | 545.28 |
| Deposits | 1,700.00 |
| Total other assets | \$ 2,973.72 |
| <hr/> | |
| Total assets | <u>\$228,838.40</u> |

Liabilities:

Current

| | |
|--------------------------------|--------------|
| Notes payable | \$ 13,659.15 |
| Drafts payable | 41,369.67 |
| Accounts payable | 4,697.11 |
| Accrued items | 2,228.17 |
| <hr/> | |
| Total current liabilities ... | \$ 61,954.10 |
| Reserve for income taxes | 10,903.79 |
| Capital stock | 60,000.00 |
| Earned surplus | 95,980.51 |

9. Under the said agreement of September 29, 1952, plaintiff is entitled to one-fourth ($\frac{1}{4}$) of the said earned surplus, or \$23,995.12 and one-fourth ($\frac{1}{4}$) of the paid in capital of \$60,000.00 or \$15,-

000.00, making a total amount of \$38,995.12, which the Court finds to be the purchase price of plaintiff's stock under the said agreement of September 29, 1952.

10. The Court finds that it is the intent of the parties under paragraph 4 of the agreement of September 29, 1952, that if the value of the shares of corporation exceeded the par value of said shares, the plaintiff was to pay to defendant \$15,000.00 of the purchase price, within fifteen (15) days after said purchase price was determined, and the balance in twelve (12) equal monthly installments, commencing one hundred and five days after the date of the determination of the said purchase price.

Conclusions of Law

1. The Court has jurisdiction over this action.

2. Plaintiff is entitled to judgment as against defendant in the amount of \$38,995.12 to be paid \$15,000.00 on or before November 10, 1955, and the balance of \$23,995.12 in twelve (12) equal monthly installments commencing February 8, 1956, with interest at the rate of six per cent (6%) per annum on any amount not paid when due, with plaintiff to have his costs.

Let judgment be entered accordingly.

Dated: November 14, 1955.

/s/ PAUL D. SHRIVER,

Judge of the District Court.

Approved as to form:

TURNER & STEVENS,

By /s/ LYLE H. TURNER,
Attorney for Plaintiff.

E. R. CRAIN,

/s/ E. R. CRAIN,
Attorney for Defendant.

Entered in Civil Docket nunc pro tunc as of November 14, 1955, by direction of Court on oral agreement of counsel.

/s/ ROLAND A. GILLETTE,
Clerk.

[Endorsed]: Filed December 16, 1955.

District Court of Guam, Territory of Guam
Civil Action No. 27-55

JOAQUIN A. PEREZ, Plaintiff,

vs.

CRISTOBAL HINES, Defendant.

JUDGMENT

This cause came on for trial before the Court without a jury, on the 24th day of October, 1955, and the issues having been tried and the Court having directed that plaintiff recover from defendant the sum of \$38,995.12 to be paid \$15,000.00 on or before November 10, 1955, and the balance of \$23,-

995.12 in twelve (12) equal monthly installments commencing February 8, 1956, and plaintiff's costs of action,

It Is Hereby:

Ordered, Adjudged and Decreed that plaintiff recover from defendant the sum of \$38,995.12 to be paid \$15,000.00 on or before November 10, 1955, and the balance of \$23,995.12 in twelve (12) monthly installments commencing February 8, 1956, with interest at the rate of six per cent (6%) per annum on any amount not paid when due, with plaintiff to have his costs of action. 1/13/56 Costs taxed in sum of \$645.23.

Dated: November 14, 1955.

/s/ PAUL D. SHRIVER,
Judge.

Approved as to form:

TURNER & STEVENS,
By /s/ LYLE H. TURNER,
/s/ E. R. CRAIN.

Entered in Civil Docket nunc pro tunc as of November 14, 1955, by direction of Court on oral agreement of counsel.

By /s/ ROLAND A. GILLETTE,
Clerk.

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Cristobal C. Hines, Defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of December, 1955.

Dated this 3rd day of January, 1956.

/s/ E. R. CRAIN,
Attorney for Appellant.

[Endorsed]: Filed January 3, 1956.

[Copy]

MINUTES

Civ/27/55 Joaquin A. Perez vs. Cristobal C. Hines
1955

5/31—Notice of Motion to Dismiss having been filed this date, Ordered that the hearing on the said motion be set for Friday, June 10, 1955, at 9:30 a.m., as set forth in the notice.

6/10—Hearing on Motion:

Plaintiff appears by Russell L. Stevens, his attorney. Defendant appears by E. R. Crain, his attorney. Having heard the arguments of the attorneys for the respective parties, the

Court denies the motion to dismiss the Complaint and gives the attorney for the defendant twenty (20) days to answer.

7/20—Issues having been joined, Ordered cause placed on the calendar for hearing on Friday, August 5, 1955, at 9:30 a.m. for resetting for Pretrial Conference.

8/5 —Hearing for Resetting:

Plaintiff appears by Russell L. Stevens, his attorney. E. R. Crain, attorney for defendant, not present. Having heard the attorney for the plaintiff, Ordered cause placed on calendar for Pretrial Conference on Tuesday, August 30, 1955, at 9:30 a.m.

8/30—Pretrial Conference:

Plaintiff appears by Lyle H. Turner, his attorney. Defendant appears by E. R. Crain, his attorney. Action has been placed in the calendar for trial on Monday, October 17, 1955, at 9:30 a.m., as set forth in the Pretrial Order filed herein.

10/14—By oral agreement between the attorneys for the respective parties, Ordered that that trial be postponed until Monday, October 24, 1955, at 9:30 a.m.

10/24—Trial:

Plaintiff appears in person and with Lyle H. Turner, his attorney. Defendant appears

in person and with E. R. Crain, his attorney. Thereupon comes the evidence on behalf of the plaintiff and certain documents marked Plaintiff Exhibits 1, 2, 3, 4, 5, 7, 8 and 9 are offered in evidence, and are accepted without objection and filed. During cross-examination, a certain document marked Defendant Exhibit A is offered in evidence, and is accepted without objection and filed. Counsel stipulate that copy to be made of Section 3 of a Recapitulation of Accounts Receivable, which is to be introduced as Defendant Exhibit B. Certain document is marked Plaintiff Exhibit 6 for identification only. Counsel stipulate that copy of deposition of Lathrop is introduced in evidence subject to objection by counsel for the defendant after he has read it and that the original when received is to be substituted therefor. Document attached to the deposition is to be replaced by the original when it is received. Taking of evidence continued until the hour of 4:50 o'clock p.m. when the Court recessed until the following day, Tuesday, October 25, 1955, at 9:30 a.m.

10/24—Trial Resumed:

All parties present as heretofore. Taking of evidence on behalf of the plaintiff continued and at the conclusion of which the plaintiff rests. Defendant through his attorney moves

to dismiss the complaint. Motion is denied. Counsel stipulate on the appraisals for the equipment as follows:

By Forkner, \$22,300.00.

By Lathrop, \$41,036.00.

By Norris, \$34,391.00.

Thereupon comes the evidence on behalf of the defendant and during cross-examination a certain document marked Plaintiff Exhibit 10 is offered in evidence and is accepted without objection and filed. By stipulation between counsel, the deposition of Schwendinger is introduced and accepted in evidence and that the plaintiff reserves the rights to relevancies. It is further stipulated that the deposition be filed in order not to read it into the records. At the conclusion of the evidence, the defense rests.

Ordered that the case be continued until Wednesday, October 26, 1955, at 9:30 a.m.

10/26—Oral Opinion and Judgment:

All parties present as heretofore. Court states his oral opinion. Court finds issues joined in favor of the plaintiff and against the defendant. Judgment will therefore be entered in favor of the plaintiff and against the defendant in the sum of Thirty-eight Thousand and Nine Hundred Ninety-five Dollars and Twelve Cents (\$38,995.12).

Judgment will be entered in accordance with paragraph 4 of the agreement on the basis of payment of Fifteen Thousand Dollars (\$15,000.00) within fifteen (15) days from today and the amount of Twenty-three Thousand Nine Hundred Ninety-five Dollars and Twelve Cents (\$23,995.12) is then to be paid in twelve (12) equal monthly installments ninety (90) days after the Fifteen Thousand Dollars (\$15,000.00) is paid. Plaintiff will prepare Findings of Fact, Conclusions of Law and settle with the defendant in ten (10) days, and will also prepare satisfactory judgment.

The below-named persons, having been duly sworn, testified during the course of the trial, as follows:

For the Plaintiff:

1. Joaquin Arriola Perez.
2. Stanley K. Kaneshiro.
3. Ireneo S. Viray.
4. Sherwood Wiseman.
5. Spencer M. Forkner.
6. James Norris.

For the Defendant:

1. E. R. Crain.
2. Cristobal C. Hines.

For the Plaintiff (In Rebuttal):

1. Lyle H. Turner.

11/23—Motion for Settlement of Findings of Fact, Conclusions of Law and Judgment having been filed this date, Ordered that the case be placed in the calendar for hearing on the said motion Friday, December 2, 1955, at 9:30 a.m.

12/2 —Hearing on Motion:

Plaintiff appears by Lyle H. Turner, his attorney. Defendant appears by E. R. Crain, his attorney. Having heard the attorneys for the respective parties, Ordered that the case be set over to Friday, December 9, 1955, at 10:30 a.m., for conference in Judge's Chambers.

1956

1/16—Notice of Motion for a review of action of the clerk in taxing costs herein, etc., having been filed this date, Ordered that hearing on the said motion be set for Friday, January 27, 1956, at 9:30 a.m.

1/27—Hearing on Taxing of Costs:

Plaintiff appears by Russell L. Stevens, his attorney. Defendant appears by E. R. Crain, his attorney. Having heard from the attorneys and after reviewing the costs as set forth, Ordered that costs be allowed as heretofore taxed by the Clerk.

Attest: A True Copy.

District Court of Guam, Territory of Guam
Civil Case No. 27-55

JOAQUIN A. PEREZ, Plaintiff,

vs.

CRISTOBAL C. HINES, Defendant.

Before: The Honorable Paul D. Shriver, Judge

TRIAL

TRANSCRIPT OF PROCEEDINGS

October 24, 1955

October 25, 1955

October 26, 1955

Agana, Guam

Appearances:

For the Plaintiff:

LYLE H. TURNER,
TURNER & STEVENS,
Attorneys at Law,
Agana, Guam.

For the Defendant:

E. R. CRAIN,
Attorney at Law,
Agana, Guam.

Monday, October 24, 1955—9:30 A.M.

The Court: First order of business?

The Clerk: Civil matter No. 27-55, Joaquin A. Perez vs. Cristobal C. Hines, coming on for trial.

The Court: Plaintiff ready?

Mr. Turner: Ready, your Honor.

The Court: Defendant ready?

Mr. Crain: Ready, your Honor.

Mr. Turner: If you Honor please, in regard to the deposition of Walter Lathrop I have received my copy but I understand the Court's copy has not come in and Mr. Crain has not come in.

Mr. Crain: I don't need my copy.

The Clerk: I asked Si to check at the post office to make sure it was received, but they have not received it.

The Court: It has not been received here. Are counsel in a position to stipulate that the copy may be introduced as the original.

Mr. Crain: The copy we can use for the time being.

The Court: Very well.

Mr. Turner: We will call Mr. Joaquin A. Perez, the plaintiff, as the first witness.

MR. JOAQUIN A. PEREZ

the plaintiff called as a witness in his own behalf,
was duly sworn and testified as follows: [2*]

Direct Examination

By Mr. Turner:

Q. Will you kindly state your full name and address?

A. Joaquin Arriola Perez; resident, Tumon Bay, west end.

Q. What is your occupation?

A. Businessman.

Q. Are you familiar with the Guam corporation known as Island Service Company, Inc.?

A. I am.

Q. Have you at any time been a shareholder in that corporation? A. Yes.

Q. Over what period?

A. From November 1, 1949, to on or about 30 September, 1952.

Q. During the time you were a shareholder in that corporation do you remember the number of capital shares that you held? A. \$15,000.

Q. Computed at par value?

A. The par value of my shares was \$15,000.

Q. Do you remember what the par value per share was?

A. Will you repeat that question, please?

Q. Do you remember what the par value per share was in Island Service Company, Inc.?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Joaquin A. Perez.)

A. What was each share worth? [3]

Q. If you don't remember, say so.

A. I don't remember.

Q. I see. Kindly mark that for identification.

(The clerk complied with the request.)

Q. I show you a two-page document, typewritten and marked Plaintiff's Exhibit 1 for identification and ask you if you recognize it or can identify it? A. Yes.

Q. What is it?

A. This is the articles of incorporation of Island Service Company, Inc.

The Court: I just direct counsel's attention to the fact that under the stipulation, the contract attached to the complaint is a true and correct copy of the original contract and that contract recites the par value. It was \$600 a share.

Mr. Turner: Yes, I wanted to get to it. I was just leading up with some other questions that may have some value, your Honor.

Mr. Crain: I have no objection.

Mr. Turner: I offer this in evidence as Plaintiff's Exhibit 1.

The Court: Very well, it may be received without objection.

Q. (By Mr. Turner): Did you pay to the corporation a consideration for your shares? [4]

A. Yes, I did.

Q. Did you subsequently sell your shares in the corporation? A. I did.

(Testimony of Joaquin A. Perez.)

Mr. Turner: May the record show that whenever I refer to "the corporation" I am referring to Island Service Company, Inc.

Q. (By Mr. Turner): When?

A. October 1, 1952.

Q. To whom did you sell your shares?

A. Cristobal C. Hines.

Q. Was that sale pursuant to any agreement?

A. Yes, to the best of my knowledge.

Q. Were you present at the time the written agreement was drawn up and executed?

A. Yes.

Q. Where was the agreement drafted and executed?

A. In the office of E. R. Crain and Phelan, attorneys at law.

Q. Who was present at the time of the drafting and execution of the agreement?

A. If I remember correctly Attorney Turner, Attorney Phelan, Mrs. Crain, acting as the stenographer, Cristobal Hines, Arturo Hines, Tomas Flores, myself.

Q. Did you state whether or not Mrs. Phelan was present? A. She was present. [5]

Q. During that drafting was Mr. Phelan acting as attorney for Mr. Hines?

A. Yes, as I understood it.

Q. And were you represented by counsel?

A. Yes.

(Testimony of Joaquin A. Perez.)

Q. Were your shares of stock in Island Service Company, Inc., evidenced by one share certificate or more than one share certificate?

A. If I remember correctly this certificate was prepared, I presume, by the office of E. R. Crain and Phelan and was signed over—the certificate was signed over to Hines.

Q. When was that?

A. After the signing of the agreement.

Q. Do you remember the date that you indorsed the certificate and transferred it over to Mr. Hines?

A. On or about——

The Court: Hadn't we better get an answer to your question before? Your question was, were the shares of stock represented by one certificate or more than one?

Mr. Turner: I will reask that question.

A. One certificate.

Q. (By Mr. Turner): One certificate. Do you understand that prior to the sale of this stock and this agreement no share certificate had ever been issued to you by the corporation?

A. That is correct. [6]

Q. And the share certificate which you have testified you indorsed and delivered over was prepared at the time of the agreement, to the best of your knowledge?

A. It was there in the office. I can't very well say it was at that very moment when it was prepared.

(Testimony of Joaquin A. Perez.)

Q. But you had not seen it prior to the time you signed and indorsed it over? A. No.

Q. Have you ever received any payment from Mr. Cristobal C. Hines for the shares of stock in Island Service Company which you have testified you indorsed in blank and turned over to Mr. Hines? A. No.

Mr. Turner: Your witness.

Cross-Examination

By Mr. Crain:

Q. Mr. Perez, you testified that you paid into the corporation the full consideration for your shares of stock. Was that in cash? A. No.

Q. What was the consideration that you paid?

A. The consideration for the shares I have with Island Service Company, payment of such was made partly in the form of equipment and automotive parts and \$2,000 in cash.

Q. Was the \$2,000 actually cash or check? What medium [7] of exchange was used?

A. At the time that the Island Service Company was organized I had personally deposited \$5,000 with NSC. The Island Service Company when it was organized, with my permission, took advantage of that deposit because at that time NSC requires the deposit of \$5,000 for the purchase of fuel products. It was agreed by the incorporators that \$2,000 of that should be credited to my investment.

(Testimony of Joaquin A. Perez.)

Q. Was that \$2,000 actually credited to your investment on the books of the company?

A. It was never reflected on the books, as I understand it, because the deposit was never reimbursed to me until March of 1950.

Q. It was on March of 1950?

A. About March of 1950.

Q. You mean you got the \$5,000 back?

A. Um-huh, from NSC.

The Court: What is NSC?

A. Naval Supply Center, at that time.

Q. (By Mr. Crain): Naval Supply Center—they were purchasing petroleum products from the military?

A. That is correct.

Q. You got the \$5,000 back?

A. Right and turned it over to the company.

Q. All \$5,000? [8] A. All \$5,000.

Q. Is that \$5,000 reflected on the books of the company?

A. I can produce the check I indorsed.

Q. And that was in March, 1950?

A. On or about March, 1950.

Q. Who was keeping the books of the company at that time, Mr. Perez?

A. March, 1950—Mrs. Elizabeth D. L. Flores was assistant and Manuel F. Leon Guerrero. She was helping Manuel F. Leon Guerrero, who was actually responsible for setting up the books of the company.

(Testimony of Joaquin A. Perez.)

Q. Is Mr. Manuel F. Leon Guerrero the gentleman who is Director of Land Management today?

A. Right.

Q. Is Mrs. Elizabeth De Leon Flores one of the officers and a director of Guam Lumber Corporation?

A. Not that I know of.

Q. But Mr. Guerrero, Mr. Leon Guerrero, was the man who was keeping the books as of March, 1950?

A. To the best of my recollection, yes.

Q. This \$5,000 deposit that was returned from NSC then if it were entered in the books of the company would have been entered by Mr. Manuel F. Leon Guerrero?

A. That is right.

Q. Now, you testified you had no share certificate in the [9] company prior to September 30, 1952?

A. Except a certificate signed by the treasurer.

Q. Isn't it correct that no share certificates had been issued prior to September 30, 1952?

A. None that I know of.

Mr. Crain: I have nothing else.

Redirect Examination

By Mr. Turner:

Q. Just for purposes of clarification—it is my understanding that at the time this deposit was made with NSC that it was necessary to deposit a certain amount of money with that Navy activity in order to purchase gas on credit?

A. NSC requires all civilian purchasers to place a guarantee deposit with them.

(Testimony of Joaquin A. Perez.)

Q. And as a result of that guarantee deposit it was possible to purchase gas and be billed at the end of the month? A. That is right.

Q. After the corporation was formed the Island Service Company was able to purchase gas against that deposit?

A. If I may explain further—the deposit was made originally by myself. It was my own money and, as I said, Island Service Company, Inc., was making its purchases. I had that company named “Island Service Company,” so we were purchasing gasoline and Diesel oil from NSC on the strength of that privilege of Island Service Company, which was entirely [10] my own.

Q. And then after you got the refund check you indorsed it over to the company and cashed it?

A. That is right.

Mr. Turner: I have no further questions.

Mr. Crain: No other questions.

The Court: You may be excused.

Mr. Turner: Your Honor, I have subpoenaed certain of the company's books and I want to tell Mr. Crain what I need. I will state for the record the plaintiff will require the ledger, the journal entries, accounts receivable record, payroll book, bank statements and any copies of the appraisals made of the corporation. Would you call Mr. Stanley Kaneshiro?

MR. STANLEY K. KANESHIRO

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Turner:

Q. Will you kindly state your name and address? A. Stanley K. Kaneshiro.

Q. Where do you reside?

A. Trust Territories Compound.

Q. What is your occupation?

A. Chief Accountant, Trust Territories.

Q. What is it? [11] A. Chief Accountant.

Q. Trust Territories? A. Right.

Q. How long have you been so employed?

A. One year.

Q. Prior to your employment as chief accountant for the Trust Territory, by whom were you employed?

A. Public accounting and private practice.

Q. How long have you been engaged in public accounting, either on your own or as an employee for someone else? A. About six years.

Q. Were you ever employed as an accountant by Island Service Company, Inc., a Guam corporation? A. Yes.

Q. When were you so employed?

A. About September, 1951.

Q. Until what time?

A. Until September 30, 1952.

Q. Were you ever requested to make an audit of Island Service Company, Inc., records as of Oc-

(Testimony of Stanley K. Kaneshiro.)

tober 1, 1952? A. Yes, I was.

Q. By whom were you so requested?

A. By Attorney Lyle Turner.

Q. I show you a typewritten document and ask you if you recognize it? [12] A. Yes, I do.

Q. What is it?

A. Authorization to make a joint audit of Island Service Company.

Mr. Turner: I would like to have this submitted in evidence, your Honor, without objection.

Q. (By Mr. Turner): Did you, pursuant to such authorization, make such an audit?

A. Yes, sir.

Q. Was that audit made jointly with any other person?

A. The audit was made jointly with Ireneo Viray.

Q. Would you spell that?

A. I-r-e-n-e-o V-i-r-a-y.

Q. And who is Mr. Viray?

A. He was the bookkeeper of Mr. Hines, Mr. Cristobal Hines.

Q. I show you a one-page typewritten document and ask you if you can recognize it?

A. Yes, I do.

Q. What is that document?

A. It's a balance sheet of Island Service Company, Inc., which I prepared as of September 29, 1952.

Mr. Turner: Your Honor, I will ask to have this document admitted in evidence as Plaintiff's Ex-

(Testimony of Stanley K. Kaneshiro.)

hibit next in order—I understand without objection. [13]

The Court: Without objection, it will be received—Plaintiff's No. 3.

Mr. Turner: May I borrow Plaintiff's Exhibit 2 for a moment, please?

Q. (By Mr. Turner): Mr. Kaneshiro, I show you Plaintiff's Exhibit 2 and call your attention to the first sentence, which I shall read for the record: "You are to jointly make an audit of Island Service Company, Inc., from the inception thereof to October 1, 1952," and I note that your balance sheet which you say you prepared as a result of that audit is dated September 30, 1952. Was there any difference in the position of the corporation as of September 30 and October 1, 1952?

A. Can you repeat that?

Q. Well, in other words, the memorandum instructed you and Mr. Viray to make an audit of the corporation from its inception to October 1, 1952, and I notice your balance sheet is dated September 30, which is a difference of one day, and I ask if that would make any difference in the audit of the corporation?

A. If the memorandum had read "through October 1, 1952," we would have had to include any receipts through October 1, 1952.

The Court: Do I understand this is as of the close of business, September 30, 1952?

A. That is right. [14]

Q. (By Mr. Turner): Mr. Kaneshiro, I am

(Testimony of Stanley K. Kaneshiro.)

going to refer to Plaintiff's Exhibit No. 3 in connection with this testimony. I note that the current assets, cash on hand and in bank, September 30, 1952, you have listed as \$19,699.40. Will you kindly state to the court the basis on which the value of that asset was derived?

A. The cash on hand and cash in bank was checked and found to be exactly as recorded there.

Q. Do you have any working papers, Mr. Kaneshiro, that you base this balance sheet upon?

A. Yes.

Q. Can you tell me what the amount of cash on hand was on September 30, 1952?

A. Well, the cash on hand consisted of lots of items. The major item was \$16,862.53. That was transferred to Mr. Hines from Mr. Perez. It was withholding tax that Mr. Hines kept at the Hines enterprise.

Q. Do you have the amount of that withholding tax?

A. It was \$100.60.

Q. Go ahead.

A. It included checks which were returned by the bank, not accepted for deposit, which Mr. Hines held, amounting to \$67.73. It included cash receipts for September for the Island Service Co. of \$503.88. It included cash receipts for Agana Service Station which was \$132 even. The total cash on [15] hand, \$17,666.74.

Q. You said that the account with the bank was verified in determining the cash on hand and in bank?

A. That is right.

(Testimony of Stanley K. Kaneshiro.)

Q. Were any of those items jointly verified by you and Mr. Viray? A. It was, sir.

Q. Do you know of your own knowledge whether there was any disagreement between you and Mr. Viray between the total cash on hand and in bank?

A. Not that I know of, sir.

Q. Now, we have here the original books and records of Island Service Company, Inc., and if you need to refer to any of those, we will do so. The accounts receivable is listed as \$69,767.24. Can you kindly tell the court how that figure was reached?

A. The accounts in the record were checked to arrive at the figure.

Q. Was that a joint check by you and Mr. Viray? A. That is right.

Q. You set up a reserve for bad debts of \$6,583.87, is that correct?

A. That is right; that was the reserve on the books.

Q. And you had a net asset of accounts receivable of \$63,183.37, is that correct? [16]

A. That is right.

Q. You have notes receivable of \$1,000. What is that?

A. That is the note that is receivable from Henry Mar in the amount of \$1,000.

Q. You have an item "Deposit," \$1,700. What does that constitute?

A. It consists of two items. The first item, deposit with the Naval Supply Depot, warranty de-

(Testimony of Stanley K. Kaneshiro.)

posit, \$1,200, and a Naval deposit on garbage collection of \$500.

Q. For what purpose was that first deposit, \$1,200, that you testified to?

A. I don't recall correctly at the present time, but it was either Diesel or gasoline.

Q. That was a deposit to cover purchases made?

A. That is right.

Q. You have "Inventory-Merchandise," \$48,506.65. Will you state to the court how that figure was reached?

A. The inventory, the actual physical count was taken by a representative of Mr. Hines, and Mr. Viray and I did the pricing on the extensions and additions and the figure is the actual figure that we arrived at.

Q. Was that inventory reduced to writing?

A. I believe the records——

Q. Was the inventory reduced to writing?

A. Yes, sir. [17]

Q. Was it signed by any of the parties?

A. I don't recall exactly, sir.

Q. Now, "Inventory-Autos" you have listed as \$11,489.33. Will you kindly state how that was reached?

A. The inventory of autos was made by actual physical count and reconciled to whatever sales were made after the period of the audit and the records will substantiate it.

Q. Is that in the corporate records?

A. That is right, sir.

(Testimony of Stanley K. Kaneshiro.)

Q. At what price were the automobiles valued?

A. Actual cost to the corporation.

Q. Does that include freight and insurance to Guam?

A. That is right, sir.

Q. And that same statement applies with reference to the merchandise inventory?

A. That is right, sir.

Q. Who actually figured the cost on both of those two inventories?

A. It was done jointly.

Q. By whom?

A. Ireneo Viray and myself.

Q. Now, you have listed as prepaid insurance an item of \$728.44. What was that?

A. It was fire insurance paid to E. T. Calvo Insurance Company. The amount was \$728.44, which had not expired at the [18] time of the audit or period of audit.

Q. How was the amount of prepaid insurance determined by standard accounting methods?

A. The actual amount paid for the insurance is determined and the length of the coverage. If it covers one year and six months or if it expires in six months, it is deducted from the total cost and the prepaid insurance remains.

Q. Now, you have prepaid expenses listed of \$545.28. Of what do they consist?

A. Prepaid expenses consisted of four items: It's payment of business license, \$50; payment of auto license, \$48.58; payment of rent, Tamuning, \$400; payment of rent, Agana, \$46.70.

(Testimony of Stanley K. Kaneshiro.)

Q. Now, did you apply the same method of computation that you did to insurance, namely, prorating the amount of unused——

A. That is right.

Q. Over the entire period of the expenses. Now, you listed under fixed assets, office equipment, \$250. Would you kindly state what those items consist of and the amount thereof? The office equipment consisted of three items: One typewriter for \$25; one calculator, \$125, and one cash register, \$100; total amount, \$250.

Q. And you have a reserve for depreciation of \$61.25. How did you determine that?

A. We estimated the life of the equipment throughout the [19] year that had expired and made a calculation as to the length of life of the equipment for five years since the time of purchase and we divided the cost by five to arrive at the amount of depreciation.

Q. When you say "we," who do you mean?

A. Mr. Viray and I.

Q. Was that depreciation schedule jointly agreed upon by you and Mr. Viray?

A. I am not sure about that, sir, but the procedure was agreed upon.

Q. Now, you have a fixed asset listed of furniture and fixtures of \$845. Of what did those items consist?

A. They consisted of ten items, sir.

Q. Would you kindly read them off and the values apportioned to each?

A. One desk, \$37.50; one desk, \$37.50; one show-

(Testimony of Stanley K. Kaneshiro.)

case, \$90; one showcase, \$90; and one showcase, \$90; one showcase, \$90; one showcase, \$125; one showcase, \$125; one cash box, \$10; one filing cabinet, \$150.

Q. Now, the values affixed there—do they constitute the actual cost of that item?

A. That is right.

Q. And may I ask if that same statement is true of the office equipment of the corporation?

A. That is right. [20]

Q. And you have listed a reserve for depreciation on furniture and fixtures of \$108.42. How did you arrive at that figure?

A. We estimated the life of the furniture and fixtures and determined the expired portion.

Q. Now, when you say “we,” you mean you and Mr. Viray?

A. That is right, sir.

Q. You have buildings listed as \$26,651.92. I refer you to Plaintiff’s Exhibit 2: “Fixtures attached to the realty, excluding mechanical contrivances, shall be valued at cost to the corporation, depreciated to October 1, 1952, which depreciation shall be over the period of the lease of the corporation of the premises upon which the corporation is located,” and ask you how you reached that figure of \$26,651.92 for the buildings?

A. We checked the record to arrive at the actual cost of the buildings.

Q. So this \$26,651.92 is the actual cost to the corporation based upon a check of the actual records of the corporation?

A. That is right.

(Testimony of Stanley K. Kaneshiro.)

Q. And you have a reserve for depreciation of \$4,882.82. How did you reach that figure?

A. It was jointly agreed between Mr. Viray and myself.

Q. Was that based upon the lease of the corporation?
A. It depended upon the assets. [21]

Q. I mean, the depreciation. Did you depreciate the buildings over the period of the lease of the corporation?

A. That is right, but the useful life of some would end prior to the expiration of the lease. The depreciation varies because of assets, for instance, where an item was a quonset warehouse it wouldn't last as long as a frame building which was built there.

Q. Now, you have an item, "Equipment, \$12,445. What does that consist of?

A. That is the actual book value that was kept on the records of the corporation for equipment that was on hand.

Q. Does that include any of the rolling stock, mechanical fixtures?
A. That is right, sir.

Q. Any of the heavy equipment?

A. That is right, sir.

Q. Now, turning to the liabilities—you have accounts payable of \$5,015.61. Of what did that consist?

A. That consisted of items payable to various creditors of the corporation. You want them listed?

A. Yes, kindly list them.

A. J & G Motor Company, \$789.88; Marsport,

(Testimony of Stanley K. Kaneshiro.)

\$369.66; Guam Commercial Corporation, \$132.35; F. D. Perez & Bros., \$16.50; Hines Enterprises, \$712.85; J. A. Perez, coral, \$899.50; Getz Brothers, \$49.40; J. A. Perez, sand, \$10.50; Standard Vacuum Oil Co., \$22.75; Utility Agency of Guam, \$116.22; J. B. Little & Company, \$75.00; Pedro L. S. Sablan, \$45; Materne's, \$66.50; Guam National Enterprises, \$318.50. [22]

Q. You have drafts payable, \$31,237.48. Will you kindly state to the court how you reached that figure?

A. It was determined by contacting the bank and determining what drafts were outstanding.

Q. And do you have a list of those drafts?

A. Yes, sir.

Q. Kindly read them.

A. Bank of America drafts listed by creditors: Borg-Warner, \$2,261.01; Borg-Warner, \$6,028.92; Borg-Warner, \$7,202.07; Champion Products, \$2,361.79; Felt Products, \$1,391.51; Pan American Distributing Company, \$5,501.57; Pan American Distributing Company, \$624.42; Pan American Distributing Company, \$8,681.33; Getz Brothers, \$814.68.

Q. Now, you have notes payable of \$16,959.15. Of what do they consist?

A. They consist of notes that were prepared for Joaquin A. Perez from the records of the corporation.

Q. "Accrued Salaries and Wages"—of what did that consist?

(Testimony of Stanley K. Kaneshiro.)

A. That was for the period of September 16 to September 30 as determined from payroll records available.

Q. I see. Now, do I understand, that was of the close of business September 30 and they had not been paid? A. That is right.

Q. That was the last two weeks of the month of September, 1952? [23] A. That is right.

Q. "Accrued Taxes"—kindly state what those items are.

A. Accrued taxes payable to the Government of Guam for withholdings of employees' salaries.

Q. Was that for the second quarter of 1952?

A. That is right.

Q. Now, as I understand it, in figuring these liabilities on the accounts payable that was an actual joint check of the records?

A. That is right.

Q. Of the corporation. The drafts payable were determined by checking with the Bank of America?

A. That is right.

Q. Notes payable were determined by a specific check of the corporate records?

A. That is right, sir.

Q. Accrued salaries and wages were from the payroll ledger? A. That is right, sir.

Q. And accrued taxes——

A. Same thing, sir.

Q. So you reached total liabilities of \$55,440.71. Now, you have capital stock issued in the amount of \$60,000. On what do you base that?

(Testimony of Stanley K. Kaneshiro.)

A. We based that on the memorandum we received from [24] Lyle Turner and E. R. Crain.

Q. That is this Plaintiff's Exhibit 2?

A. That is right, sir.

Q. Now, you have an item, "Equipment Revaluation Surplus, \$26,151.89." Would you state to the court how you reached that?

A. The memorandum asked—it didn't require the auditors to determine the value of the equipment. The determination of the value of the equipment was made by others and I trusted the appraiser and the figures reflected as equipment revaluation surplus was the difference between the actual book value of the equipment and the figure we received from the attorneys as the cost of equipment.

Q. In other words, you have reflected on your balance sheet this mechanical heavy equipment that was to be appraised you have put in at book value and any figure above the book value reached by the appraisers would be listed under equipment revaluation surplus? A. That is right, sir.

Q. How did you compute this earned surplus?

A. That is the difference between the assets and liabilities.

Q. In other words, that is the difference between—after deducting from the assets the liabilities and the capital stock?

A. That is right. [25]

Q. How did you reach this "Net Profit for the Nine Months Ended 9/30/52"?

(Testimony of Stanley K. Kaneshiro.)

A. That is the actual amount from the operation of the business that we determined.

Q. You say "we"?

A. As recorded on the books.

Q. This \$30,774.33 was actually recorded on the books of the corporation?

A. That is right, sir.

Q. In what ledger is that reflected? In what book?

A. In the statements of the corporation.

Q. What statements? Filed with the Bank of America? Based upon those records?

A. Statements filed with the Government of Guam.

Q. And the statement so filed reflected that net profit for the nine months?

A. Just a moment. I retract, sir. That is the surplus we determined that we filed with the Government of Guam, sir.

Q. And who is "we"?

A. Mr. Viray and I determined that. It is the amount that was on the record as of September 30, 1952.

Q. As being the net profit of the corporation for the nine months of 1952? A. That is right.

Q. So you ended up with a capital stock issue of \$60,000 [26] and equipment revaluation surplus of \$26,151.89 and an earned surplus of \$86,703.05?

A. That is right, sir.

Q. Let me ask you if there was any change in the figure you utilized in computing the value of

(Testimony of Stanley K. Kaneshiro.)

the equipment which was to be appraised, whether it was above or below the figure you used it would either increase or decrease the earned surplus account by that amount, is that correct?

A. That is right, sir.

Q. Did you and Mr. Viray in your joint audit use standard accounting methods?

A. Yes, sir.

Q. Did you and Mr. Viray, of your own personal knowledge, have conferences with Mr. Sherwood Wiseman subsequent to the audit?

A. Yes, sir.

Q. I will ask you whether during these conferences and as a result of those conferences with Mr. Wiseman you and Mr. Viray jointly agreed to certain adjusting entries to be made by Mr. Wiseman?

A. That is right.

Q. You agreed to those adjusting entries?

A. That is right.

Q. Did Mr. Viray in your presence agree to them? A. That is right. [27]

Mr. Turner: That is all.

Cross-Examination

By Mr. Crain:

Q. When did you first go to work for the Trust Territory? A. November 1, 1954.

Q. Approximately one year ago?

A. That is right, sir.

Q. And prior to that time, what were you doing?

(Testimony of Stanley K. Kaneshiro.)

A. Public accounting.

Q. You had a license to operate as a public accountant in Guam?

A. That is right, yes, sir.

Q. Isn't it correct you also engaged in other businesses during the same period of time you testified you were privately practicing accounting?

A. Other businesses?

Q. Businesses other than accounting?

A. I invested some money in other businesses.

Q. You say you are chief accountant in Trust Territory?

A. That is right.

Q. You are over the accountants in Honolulu and all the other islands, is that correct?

A. There is no office in Honolulu now. Everything was turned over to Guam.

Q. You have testified that this was a joint [28] audit?

A. That is right.

Q. Conducted by yourself and Mr. Viray. Now that is not true, is it? You and Mr. Viray conducted your audits for the most part separately?

A. No, sir, for the most part together. We arrived at our own findings and reconciled them.

Q. Isn't it true that this balance sheet is entirely your own and has no connection with anything Mr. Viray did in the audit of these books?

A. Well, we tried to reconcile our figures whenever possible.

Q. Isn't it true the balance sheet is entirely yours?

A. Yes, sir.

Q. Isn't it true that this balance sheet in es-

(Testimony of Stanley K. Kaneshiro.)

sence was prepared before this audit was ever started?

A. No, sir, it was after the audit, sir. Everything was reviewed and changed.

Q. Isn't this substantially the figure you came up with before the audit was started?

A. In certain cases, yes.

Q. Isn't it a fact that up to the time this audit was begun there were no books of the Island Service Company?

A. No, sir, we had records.

Q. You had a complete set of books?

A. That is right. [29]

Q. Isn't it correct that all you had up to the time this audit was started was a cash record, a book of accounts and the payroll ledger?

A. No, sir.

Q. I believe you said you went to work for Island Service Company about September, 1951?

A. That is right.

Q. Who hired you?

A. Mr. Perez.

Q. Who had been in charge of the books prior to your taking over?

A. I am not certain, sir, but I think it was a Mr. Juan Santos; he gave me instructions.

Q. Did you find a set of books in September, 1951?

A. No, sir.

Q. There were no books?

A. There were records available, cash receipts records, payroll records, all the basic records.

Q. But no books?

A. I don't know what you call "books."

(Testimony of Stanley K. Kaneshiro.)

Q. There was not an actual working set of books?

A. From the records I could pick up anything I wanted, sir.

Q. Is that what you did?

A. How is that, sir?

Q. Did you make up a set of books from the existing [30] records you had there?

A. Not only from the records.

Q. In making up the set of books that you say you prepared after September, 1951, did you feel that all of the working data that should have been there was available to you? A. Yes, sir.

Q. You didn't find anything missing?

A. Well, there were a few items that weren't there but could be substantiated from further pursuit of the items.

Q. Did you substantiate them?

A. Well, in the case of Mr. Viray and I we jointly agreed——

Q. I am not talking about Mr. Viray. I am talking about when you were keeping the books.

A. What is that, sir?

Q. Did you pick up the various items and investigate them whenever—— A. No, sir.

Q. Did you say "no"?

Mr. Turner: I object, your Honor.

The Court: He said "no" and was going on to explain.

A. No; I accepted the officers' decision in cases

(Testimony of Stanley K. Kaneshiro.)

like that, sir, instead of further pursuing the item and costing the corporation more money.

Q. Actually you testified here that you arrived at your [31] figures on this balance sheet by the use of standard accounting procedures?

A. Yes, sir.

Q. You arrived at the figure of \$6,583.87 as a reserve for bad debts? A. Yes.

Q. The bad debts at that time, or rather the outstanding accounts receivable were over \$69,000, right? A. That is right.

Q. Those accounts receivable consisted of several hundred items, did they not? A. Yes, sir.

Q. Actually between September, 1951, and September, 1952, were you merely the bookkeeper at Island Service Company or did you have other duties? A. I was a public accountant, sir.

Q. You mean you were only working part time at Island Service Company?

A. A public accountant handles quite a few accounts, sir.

Q. You were not employed as an employee? You were working for other people?

A. That is right, sir.

Q. How much time approximately did you spend at Island Service Company?

A. It depends on the circumstances, sir. [32]

Q. What was the basis of remuneration at that time?

A. \$150—I am not sure; I am not positive about it—\$150 a month.

(Testimony of Stanley K. Kaneshiro.)

Q. And you can't recall how much time you spent on the books on an average?

A. No, sir.

Q. Now, isn't it a fact that these accounts receivable at the time that you prepared this balance sheet for September 30, 1952, ran clear back into 1949?

A. Not clear back, sir.

Q. But——

A. It started September, 1949, sir.

Q. But 1949 and '50?

A. The accounts receivable.

Q. Now, in standard accounting practice, when does an account receivable begin to be stale? If it is not paid at the end of 30 days, is it still as good as it was when it was less than 30 days old?

A. I don't know what you mean. Would you explain?

Q. Under standard accounting principles, when does a debt begin to appear to be uncollectible?

A. It depends upon the circumstances, sir. Some corporations give customers 90 days, some give them 60 days, some give them ten days; it depends upon the circumstances.

Q. Isn't it a fact that the majority of these accounts [33] receivable were individuals?

A. That is right, sir.

Q. When do they begin to look dangerous? I mean, say, that the account has become six months old. Does it appear to be as collectible then as it was when it was 30 days old?

A. It depends upon the circumstances. A lot of

(Testimony of Stanley K. Kaneshiro.)

these accounts ran continuously. For instance, a grading job that lasts six months—there is an accumulation of charges.

Q. But the bulk of these accounts were individuals? A. There were a lot of them.

Q. Actually most of those accounts by September, 1952, were over a year old, were they not?

A. That is right.

Q. Did you feel that with standard accounting principles your reserve for bad debts was a fair reserve?

A. I am sorry to say—as of September 30 only—I made no attempt to make a reserve for bad debts because it was for the period ending September 30. It was jointly agreed to set up a reserve for bad debts as of September 30 so no reserve was set up for the year 1952.

Q. This \$6,000 figure was not the joint agreement between you and Mr. Viray?

A. No, sir, there was a reserve set up only for September 30, 1951.

Q. Now, in the final analysis, there was not a joint audit [34] between you and Mr. Viray?

A. There was, sir. We conducted an audit as of September 30.

Q. How long did this audit take?

A. As far as I am concerned it was a very short time for me. I went through the records and arrived at certain figures and waited for Mr. Viray to catch up.

Q. What time did you spend on this?

(Testimony of Stanley K. Kaneshiro.)

The Court: What time did you actually work?

Q. (By Mr. Crain): The time that you sat there?

A. I don't know. It was a continuous operation for some time until Mr. Viray got through.

Q. What were you doing?

A. Well, if he had any questions he would ask me.

Q. How long did this audit take?

A. It may be still going on as far as I am concerned; you haven't said.

Q. How much have you been paid so far for your services?

Mr. Turner: Objection. It is immaterial.

Mr. Crain: I don't think it is immaterial.

The Court: This is cross-examination. The objection will be overruled.

Q. How much have you been paid?

A. I don't know exactly.

Q. Is it in excess of \$4,000? [35]

A. No, sir.

Q. Do you know how much?

A. In a lot of cases your client has refused to reimburse me for time spent at the office.

Q. You mean conferences?

A. No, sir, arriving at the Island Service Company when the auditor didn't show up and I sat waiting for the auditor.

Q. Were you ever employed by the Government of Guam? A. Yes, sir.

Q. How long?

(Testimony of Stanley K. Kaneshiro.)

A. Nine months, sir, just about.

Q. Nine months. Did you sever your connection with the Government of Guam of your own volition?

A. It was at the request of——

The Court: Now, just a moment. I am not going to get into collateral issues.

A. I am willing to answer that, sir.

Mr. Crain: I will withdraw the question if the court please. I have no other questions.

Redirect Examination

By Mr. Turner:

Q. Do I understand that you worked independently on your figures in the audit and Mr. Viray did and on some of them you worked together?

A. That is right. [36]

Q. This balance sheet represents the results of your audit—the figures upon the items where you and Mr. Viray agreed and where you disagreed they represent your findings?

A. That is right.

Q. But this is your audit?

A. That is right.

The Court: May I see that?

Examination by the Court

Q. You testified, Mr. Kaneshiro, that when you and Mr. Viray had completed your respective audits that you reconciled them with Mr. Wiseman?

A. Yes, sir.

(Testimony of Stanley K. Kaneshiro.)

Q. Does this balance sheet represent the reconciliation with Mr. Wiseman?

A. No, sir, it does not.

Mr. Turner: I am willing to produce Mr. Wiseman's reconciliation through his testimony.

Q. (By the Court): This, as I understand it, represents your audit independent of any reconciliation? A. That is right.

Q. Now you testified that the reserve for bad debts was that which appeared on the books of the corporation? A. That is right, sir.

Q. In other words, you had nothing to do with the formula for establishing bad debts? [37]

A. It was agreed between Mr. Viray and I to leave that to Mr. Wiseman in each particular case where there was a question as to the amount to set up; it was agreed to leave it to him.

Q. Where did you get your figure of \$6,583.87 as a reserve for bad debts?

A. That's the amount I set up as ten per cent of charge sales.

Q. That assumes then that of accounts receivable as of September 30, 1952, of \$69,767.24, for the purposes of your audit, you assumed that all of those accounts would be paid except \$6,583.87?

A. Subject to a review of the accounts, sir, which was to be made.

Q. But for the purposes of your balance sheet?

A. Yes, sir.

Q. That was your assumption that those debts would be 90 per cent paid?

(Testimony of Stanley K. Kaneshiro.)

A. We discussed the matter and decided and talked about setting up a large reserve on that and it was decided between I and the attorneys we would leave that for the third party, Mr. Wiseman, as to what amount to set up.

Mr. Crain: Do I understand the witness correctly that that was agreed between you and the attorneys?

Q. (By the Court): You said it was agreed between you and Mr. Viray? [38]

A. No, sir. I took this matter up—I consulted Mr. Turner on this matter and there was disagreement with Mr. Viray and I asked what amount to set up and Mr. Turner said to leave the matter to Mr. Wiseman.

Q. Now I want to ask about the drafts. At the time a draft is issued is not the amount of the draft deducted from the balance at the bank?

A. I didn't get you.

Q. When a draft is issued is not the amount of that draft deducted from the balance of the bank account? A. No, sir.

Q. It's very similar to a check, isn't it?

A. No, sir, it was on a credit basis, sir. The check was issued and merchandise was in transit and we set up a liability.

Q. At the time you had a provision for overdraft at the bank? A. That is right, sir.

The Court: Questions, gentlemen?

Mr. Turner: I just want to ask one question.

(Testimony of Stanley K. Kaneshiro.)

Redirect Examination

By Mr. Turner:

Q. That reserve you set up for bad debts was one you selected for balance sheet purposes?

A. That is right. [39]

Recross-Examination

By Mr. Crain:

Q. And it was agreed upon by you and Mr. Turner that it would remain the same?

A. Not remain the same.

Q. On your balance sheet?

A. That is right.

The Court: And subject to reconciliation?

A. That is right, sir.

The Court: You want to take a ten-minute recess? The court will recess for ten minutes.

(The court recessed at 10:45 a.m., October 24, 1955, and reconvened at 10:55 a.m., October 24, 1955.)

The Court: Call your next witness.

Mr. Turner: We will call Mr. Ireneo Viray as the next witness.

MR. IRENEO VIRAY

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address?

A. Ireneo Viray, Block 8, Lot 1, Sinajana.

Q. What is your occupation?

A. I am an accountant. [40]

Q. What training in accountancy have you had? Any college? Last training in accountancy?

A. Yes, sir, I was working with an accountant and auditor, with Mr. Thomas Campbell. I audited under Mr. Thomas Campbell.

Q. How do you spell that name?

A. C-a-m-p-b-e-l-l.

Q. Where was that? A. In Manila.

Q. And how long have you been working as an accountant? A. Three years.

Q. By whom are you now employed?

A. By Butler's, Inc.

Q. In what capacity?

A. As an accountant.

Q. Were you ever employed as an accountant by Island Service Company, Inc.? A. Yes, sir.

Q. Over what period were you so employed?

A. That was—I don't remember the month but it was in 1952.

Q. Until what time?

A. Until July 31 this year.

Q. Prior to when you went to work for Island

(Testimony of Ireneo Viray.)

Service Company, Inc., in 1952 by whom were you employed? A. By Koster and Whyte. [41]

Q. Were you ever employed by Mr. Cristobal Hines in connection with his busioness?

A. I was.

Q. And for what period? That is prior to Island Service Company, Inc. employment.

A. It was in May, 1952; the beginning was in May, 1952, and the end July 31, 1955.

Q. Mr. Viray, did you ever have occasion to make an audit of Island Service Company, Inc., as of October 1, 1952? A. Yes, sir.

Mr. Turner: May I have Plaintiff's Exhibit 2, please.

Q. (By Mr. Turner): I show you a two-page document which has been marked Plaintiff's Exhibit 2 and ask you if you recognize it?

A. Yes, sir.

Q. What is that document?

A. It's a joint memorandum to Mr. Kaneshiro and myself.

Q. Did you receive such a document?

A. I got a copy, yes, sir.

Q. And did you conduct your audit of the Island Service Company, Inc., books as of October 1, 1952, pursuant to these instructions? A. Yes, sir.

Q. The instructions set forth in Plaintiff's Exhibit 2 provide that there shall be a joint audit of the books and [42] records of Island Service Company, Inc., from the commencement of the business

(Testimony of Ireneo Viray.)

until October 1, 1952. Did you conduct such a joint audit with any other person?

A. I do not know if that was a joint audit because Mr. Kaneshiro audited and I audited.

Q. I see—did you ever jointly audit any particular items?

A. Well, on the buildings we agreed to let the figures stand as they were.

Q. Well, I will get into those items as we go along, but you and Mr. Kaneshiro both audited at the same time?

A. Yes, at the same time.

Q. Over what period did your audit run?

A. From the inception of the business up to October 1.

Q. I mean when did you commence your audit?

A. I don't remember anymore.

Q. Was it after the 1st of October, 1952?

A. It was maybe 1953.

Q. How long did it take you to conduct the audit?

A. More than a year.

Q. Were you occupied on other duties during the regular work day?

A. Yes, sir.

Q. What duties were you occupied with during the regular working day? [43]

A. During the working day I was working half a day for Hines Enterprises and half a day, Island Service Company.

Q. When did you conduct the audit?

A. I left my regular work and I made those after 5 o'clock.

(Testimony of Ireneo Viray.)

Q. I show you a piece of paper, a one-page document, typewritten, and ask you if you recognize it?

A. Yes.

Q. What is that?

A. This is the balance sheet which I made, the figures of which were taken from the general ledger.

Q. Is that the result of the audit that you made of the books and records of the Island Service Company, Inc., from the commencement of the business until October 1, 1952?

A. Yes, sir.

Mr. Crain: No objection.

Mr. Turner: Your honor, I would ask to have this marked as Plaintiff's Exhibit next in order, without objection, I understand.

The Court: Very well, without objection, it will be received as Plaintiff's 4.

Q. (By Mr. Turner): Mr. Viray, the document which you previously identified has now been marked Plaintiff's Exhibit 4. I notice that it is marked "Balance Sheet 29 September 1952," while the joint instructions provide that the audit would be from the inception to October 1, 1952. Would the discrepancy [44] between the dates of September 29 and October 1 make any difference?

A. Yes, sir, it will make one day's difference.

Q. Why did you close off the balance sheet as of September 29?

A. Because September 29, 1952, Mr. Hines took over all the responsibility of receiving money and everything—from September 30.

Q. So you just audited this up to September 29,

(Testimony of Ireneo Viray.)

1952, which is prior to the time Mr. Hines took over everything? A. That is right.

Q. Now we have here in the courtroom—Mr. Hines has brought them in—all of the books and records, as I understand it, of Island Service Company, Inc. In connection with explaining Plaintiff's Exhibit 4 what documents did you require in order to support this balance sheet with the general records? A. The general ledger, sir.

Q. Would you kindly go down there and pick out the documents you require including your working papers? A. Yes, sir.

Q. I believe, Mr. Viray, you have previously testified that this constitutes the balance sheet that you prepared as a result of your audit, is that correct? A. Yes, sir.

Q. Now you have listed cash funds on hand, \$16,690.40. [45] What is that based upon? If you refer to the general ledger, will you kindly state for the record the page number of the general ledger from which you are reading.

A. Excuse me. I would like to get another book.

Q. Are there schedules missing that you require in connection with your testimony?

A. I did not see two files in there, Files 1 and 2.

Q. What are those Files 1 and 2?

A. I do not remember, sir.

Q. Are those schedules?

A. Schedules of my audit.

Mr. Turner: May I ask if during the noon recess

(Testimony of Ireneo Viray.)

you would check the corporate records and see if Schedules 1 and 2 are available.

Mr. Crain: If the court please, Mr. Hines is not the accountant, and I think Mr. Viray will have to go with him to show him what he wants.

Mr. Turner: I think he will be glad to do that.

Q. (By Mr. Turner): Now, subject to procuring Schedules 1 and 2—will you require those schedules to testify regarding the cash on hand?

A. I do not know if I will because I do not know what is missing.

Q. Do you remember what this cash on hand consisted of?

A. It consisted of cash money given by Mr. Perez to Mr. Hines on 29 September. [46]

Q. Was that \$16,000? A. Yes, sir.

Q. That is cash Mr. Perez gave Mr. Hines on September 29? A. Yes, sir.

Q. And did you see the transaction?

A. Yes.

Q. You verified that there was \$16,000 delivered by Mr. Perez to Mr. Hines?

A. I am not exactly sure of the figure, but I know that it was cash money given by Mr. Perez to Mr. Hines.

Q. And this cash figure from the current assets was drawn from the books of the company, the original books and records? A. Yes, sir.

The Court: Now, in order to avoid confusion, will you clarify the question as to whether Mr.

(Testimony of Ireneo Viray.)

Perez delivered this cash as secretary of the corporation rather than in an individual capacity?

Q. (By Mr. Turner): Was this transfer of cash of the corporation from Mr. Perez to Mr. Hines in connection with Mr. Perez' turning over the active management of the company to Mr. Hines? A. I do not know, sir.

Q. Well, after September 30 you testified Mr. Hines took over the control and management of Island Service Company, Inc., [47] is that correct?

A. Yes, sir.

Q. And was this transfer of cash from Mr. Perez to Mr. Hines in connection with that turn-over? A. Yes, sir.

Q. And this \$16,000 cash was money the corporation collected? A. Yes, sir.

Q. Now, you have cash in bank of \$2,407.66. How was that figure derived?

A. I got that from the bank statement and I reconciled the bank statement and found it correct.

Q. That \$2,407.66 was the reconciled and verified bank balance? A. That is right.

Q. That makes a total of \$19,098.06. Could I borrow Plaintiff's Exhibit 3, your Honor? Mr. Kaneshiro testified that he had found the cash on hand and in the bank, \$19,699.40, and he included in that amount certain withholding tax due to the Government of Guam which was on hand. Did you include that figure in cash on hand and in bank?

A. I did not, sir.

Q. How much did that amount to?

(Testimony of Ireneo Viray.)

A. I do not remember now, but I did not include it.

Q. Can you verify from the books how much was due and [48] owing?

A. I did verify the withholding tax, sir.

Q. Do you have that listed anywhere?

A. No, sir.

Q. Well, why did you not include the withholding tax monies on hand in the cash on hand and in the bank?

A. Because I thought that money belonged to the Government of Guam and did not belong to the corporation anymore.

Q. I see, but the corporation had it at the time?

A. Yes, sir.

Q. And if you had included that withholding tax money that was on hand in the cash on hand and in the bank that would increase your figure by the amount of the withholding tax money, is that correct?

A. Yes, sir.

Q. In other words, your figure here includes merely the cash on hand and in bank?

A. Yes, sir.

Q. Now, turning to the accounts receivable, you have "General Accounts Receivable" of \$64,576.91. Upon what was that figure determined?

A. I determined that figure after checking all the extensions, the debits and credits of all the accounts.

Q. Was there an accounts receivable ledger?

A. Yes, sir. [49]

(Testimony of Ireneo Viray.)

Q. There is one here? A. Yes.

Q. Kindly get it. That is the accounts receivable ledger sheet? A. Yes.

Q. How is that set up? Is there a ledger sheet for each accounts receivable?

A. For each month.

Q. Is that for each month, each individual account?

A. It is continuous, sir—August, September——

Q. For each individual account?

A. One leaf each.

Q. How did you determine \$64,576.91?

A. I made a list of all these after checking this book. During the course of my check-up on this book I found several errors in the extensions. For instance, this account of Camacho. There is \$1,000 difference there. The balance should be \$6,875.60; it is clear here.

Q. After making those bookkeeping adjustments you reached the total of \$64,576.91?

A. Yes, sir.

Q. Let me ask you—down here you have an asterisk and down at the bottom you have “Figures unsettled, pending, and/or requiring check-up.” Would you kindly explain to the court what you mean by that? [50]

A. It was my intention to write off all doubtful receivables instead of allowing them to stand.

Q. I see, so that is what you mean by the asterisk and “Figures unsettled, pending, and/or

(Testimony of Ireneo Viray.)

requiring check-up''? You meant that you had not written off the accounts that you had felt were bad?

A. I do not know if these are the figures—the \$64,576 is my figure after writing off all doubtful receivables.

Q. You have a reserve here for depreciation, is that correct? A. Yes, sir.

Q. Now could you have written off doubtful accounts or accounts that you felt were bad and still set up a reserve for the accounts that you kept?

A. Well, yes, sir.

Q. Let me ask you—Mr. Kaneshiro in his testimony in connection with his audit set forth the accounts receivable as \$69,767.24. Do you know why the difference between this figure of \$64,576.91 and his figure?

A. I do not remember, but one of them is the differences in the extensions of this account.

Q. You mean they are bookkeeping errors?

A. They are bookkeeping errors.

Q. Not because you wrote off any debts as bad debts before arriving at this figure? [51]

A. Yes.

Q. It's all bookkeeping errors? A. Yes.

Q. Now in connection with notes receivable you have listed here \$1,000. Mr. Kaneshiro testified it was a note of Henry Mar for \$1,000, is that correct?

A. Yes, sir.

Q. So you and Mr. Kaneshiro are in agreement on that item, notes receivable, \$1,000?

(Testimony of Ireneo Viray.)

A. Yes, sir.

Q. Now you have merchandise inventory, parts and petroleum products, \$48,540.20. Mr. Kaneshiro had merchandise inventory, \$48,506.65. Referring to Plaintiff's Exhibit 2, which is the joint instructions that you and Mr. Kaneshiro received, stock in trade was to be listed at actual cost to the corporation delivered to the warehouse of the corporation. Is that the means by which you reached that figure? A. Yes, sir.

Q. In other words, its actual cost to the corporation, including freight, insurance, port-handling charges and delivery to the warehouse?

A. Yes, we allowed only seven per cent on this; we took the invoice figures.

Q. And added a percentage for insurance, freight, and so on? [52] A. Yes, sir.

Q. Let me ask you—was this inventory of parts and petroleum products the result of any actual inventory taken? A. Yes, sir.

Q. Who took that inventory? A. We did.

Q. Who is "we"?

A. Myself and Mr. Tomas—I forget his second name—one of the employees.

Q. In other words, the inventory was taken on the company premises by the company employees?

A. Yes.

Q. Was that reduced to writing, typed out?

A. Yes, sir.

Q. Mr. Kaneshiro testified that his merchandise

(Testimony of Ireneo Viray.)

inventory figure was \$48,506.65. You have \$48,-540.20. Do you know how that difference arose between you and Mr. Kaneshiro?

A. I do not.

Q. Now your next item is automobiles which you list under inventories as \$13,637.14. How was the value of the inventory of automobiles determined?

A. I determined it by counting the automobiles that were in the premises at the time.

Q. And then did you determine the cost thereof by reference to actual invoices, freight charges and other expenses? [53]

A. Yes, sir.

Q. Mr. Kaneshiro had \$11,489.33. Do you know how the difference between your figure and his might have occurred?

A. I do not remember.

The Court: Do I understand that these are new automobiles?

Mr. Crain: Yes, sir, five new Hudsons.

Q. (By Mr. Turner): Now referring to the fixed assets. You have listed the buildings at \$17,250. Mr. Kaneshiro lists buildings, \$26,651.92: less reserve for depreciation, \$4,882.82; net, \$21,-769.10. Mr. Viray, referring to Plaintiff's Exhibit 2, which is this joint memorandum, fixtures attached to realty were to be valued at cost depreciated to October 1, 1952. In connection with the leasehold they were to be depreciated over the period of the lease. Mr. Kaneshiro testified that certain of the

(Testimony of Ireneo Viray.)

buildings did not have a useful life as long as the lease and were depreciated on a lesser basis, is that correct? A. Yes, sir.

Q. There is a difference between your and Mr. Kaneshiro's figures. Could you kindly state to the court how you reached your total of \$17,250?

A. I do not remember now how this was established, but I do remember we made an agreement on the buildings that the figure he had and I had which were the same.

Q. Oh, you and he agreed on what the cost of the buildings were, is that correct? [54]

A. Yes, sir, but I do not know why this is \$17,250 and this is \$26,000.

Q. Do you have the original ledger which may be in the courtroom which might reflect the cost of the buildings? In other words, the original cost of the buildings would be set up on your records?

A. I will show you this buildings page of the general ledger, \$17,250.

Q. But you don't have any ledger sheet which reflects the actual cost of the buildings to the company, do you?

A. (Shows page to counsel.)

Q. This is page 8 of the general ledger, isn't it, marked "Buildings," and it says "Trial Balance, December 31, 1952"?

A. Yes, sir. I will show you journal entry No. 1 where it shows "Buildings, \$17,250."

Q. And that is what you drew your figure on

(Testimony of Ireneo Viray.)

your balance sheet from? A. Yes.

Q. Less the depreciation which you have listed here at the bottom as reserve for depreciation, which is a depreciation of all of the fixed assets, so you have a total list of fixed assets of buildings, \$17,250; office equipment, \$200; furniture and fixtures, \$725; heavy equipment, \$5,550; automotive equipment, \$5,200; shop equipment, \$1,695. Now let me ask you if [55] this heavy equipment and automotive equipment are the items that were appraised by the appraiser? A. Yes, sir.

Q. So that if any different value was given to these two items of heavy equipment and automotive equipment your net amount would be increased or decreased depending upon whether your value was greater or lesser than the appraiser's for these two items, is that correct? A. Yes, sir.

Q. This shop equipment—was that appraised?

A. Yes, sir.

Q. Let me ask you—isn't it true that you listed this heavy equipment, automotive equipment and shop equipment at actual cost on here?

A. Yes, sir.

Q. And didn't ascribe any market value or any other item but the cost of the equipment?

A. Yes, sir.

Q. Now you have prepaid insurance of \$728.44. Do you remember what insurance policy that was and whose agency it was?

(Testimony of Ireneo Viray.)

A. I believe it was Workmen's Compensation Insurance by Calvo.

Q. Those two figures agree, do they not, Judge?

The Court: That is right.

Q. (By Mr. Turner): Now you have deposits of \$1,700. Do [56] you remember what those deposits were?

A. I believe those deposits, if I remember correctly—one of them was from the NSD.

Q. And what was it?

A. The deposit, I believe, it was \$1,000 for the benefit of buying diesel fuel oil from them.

Q. Would any of the books of record here verify what those deposits were? Kindly check.

A. Journal entry No. 1 of Mr. Kaneshiro for \$1,200 was a deposit made with the Naval Supply Depot; \$500 was a deposit made with NSD for garbage collection.

Q. And that is journal entry No. 1. All right, now you list merchandise in transit of \$24,737.25. How did you determine this figure of merchandise in transit?

A. At first I determined this merchandise in transit, \$24,737.25, as the merchandise that was in transit or at the dock during the time we took the inventory.

Q. And you have the actual records, an itemized list of that merchandise? A. Yes, sir.

Q. Is there any particular original document—

(Testimony of Ireneo Viray.)

what ledger would that be reflected in, just as a matter of identification for the record?

A. I believe this came from my worksheets.

Q. And your worksheets are now a part of the records of [57] the company? A. Yes.

Q. That would be determined from invoices received that the merchandise was in transit?

A. Yes.

Q. Plus the freight charges and other items of expense? A. Yes.

Q. Now you have listed a J. A. Perez clearing account. Would you first state to the court what a clearing account is from an accounting standpoint?

A. A clearing account from the standpoint of the accountant is a doubtful account until it is cleared by the company—whether we are to charge or credit the amount.

Q. Isn't it true in connection with a clearing account that you have a liability and an asset set up in the same amount? In other words, you have a J. A. Perez clearing account of \$30,280.65, but you have a deferred liability expense of \$30,266.62. In other words, don't they offset each other?

A. They do.

Q. It would not affect the surplus or net worth of a company in any way? A. It would not.

Q. The same thing would apply to the C. A. Hines Clearing Account of \$14.02? [58]

A. Yes.

(Testimony of Ireneo Viray.)

Q. And you have set up a corresponding suspense liability of the total of these two?

A. Yes.

Q. But they do not in any way affect the surplus or net worth of the company?

A. They do not.

Q. You have accounts payable of \$6,993.14. How did you determine that figure?

A. I determined that figure by finding the amount owed by the company to its creditors.

Q. Do you have a list of those accounts payable?

A. I had one; I do not know now——

Q. Will you see if you can find them in your working papers? I would like to put those into the record.

A. Page 8 of my audit book.

Q. Will you read the list of creditors?

A. James G. Little, \$75; Pedro, L. G. Sablan, \$45; Dingo Materne, \$66.50; J & G Motor Co., \$789.88; Marianas Sports & Electric Co., \$369.66; Guam Commercial Corp., \$1,323.35; Hines Enterprise, \$712.85; Joaquin A. Perez, \$3,195.53 and \$10.50; Getz Brothers, \$49.40; Standard Vacuum Oil Co., \$222.75; Government of Guam, \$116.22; Frank D. Perez and Brothers, \$16.50.

Q. All right, your next item listed is drafts payable for \$41,749.47. Would you list the drafts payable that you have? [59]

A. My drafts payable appearing on the liability side of this balance sheet amount to \$41,749.47, and I do not remember how I arrived at that figure, but

(Testimony of Ireneo Viray.)

I do know that that figure is the amount of merchandise that is in the docks.

Q. Page 9 of your working papers in connection with this balance sheet—don't you find drafts payable of \$31,617.28? A. Yes, sir.

Q. Do you know what the difference is between \$31,000 and \$41,000?

A. You see, the merchandise covered by these drafts before were presumed to amount to \$31,000, but on checking the figures with the amount of invoices I found that there should be \$41,749.17, or a difference of \$10,000.

Q. In other words you found that you had invoices for merchandise in transit which were for \$10,000 more than the drafts represented at the bank and you assumed that difference to be sight drafts which had not yet arrived at the bank?

A. Yes, sir.

Q. And did you actually verify with the bank how much was owed to drafts payable?

A. I did not, sir.

Q. You did not? The next item is notes payable of \$13,659.15. Isn't that money owed by the corporation to Mr. Joaquin Perez?

A. Yes, sir. [60]

Q. And that was represented on the company records? A. Yes, sir.

Q. You have accrued charges, payrolls, \$1,754.05. I believe that coincides with the figure Mr. Kane-shiro had and I believe you two are in agreement

(Testimony of Ireneo Viray.)

on that figure? A. (Nods head.)

Q. That represents the payroll for the last two weeks of September which had not been paid because it wasn't paid until the first of the month?

A. Yes, sir.

Q. And taxes you have listed, \$474.12. I believe that is withholding taxes? A. I think so.

Q. Now in that respect if you were to consider the withholding taxes which the company had withheld from the employees' wages as a part of the cash on hand, that figure would have to be added to your cash on hand and in bank, wouldn't it?

A. Well, I believe this figure resulted from tax prior to the period.

Q. I see, but it is still money withheld and not paid into the government, is that right?

A. That is right.

Q. Now passing over this deferred liabilities suspense account which you testified is an offset from the J. A. Perez and C. A. Hines clearing accounts and doesn't affect the balance [61] sheet, you have capital paid in of \$60,000 and you have earned surplus from November 1, 1949, which I believe was the beginning of the corporate history, to December 31, 1951, \$38,893.93, and from January 1, 1952, to September 29, 1952, \$22,334.74. You have an asterisk on that one, showing that the figure is undetermined. Why would it be undetermined? That is the earned surplus for that part of the calendar year 1952.

(Testimony of Ireneo Viray.)

A. I put in an asterisk here because this figure may be changed when other adjustments are made.

Q. You mean if there were any other adjustment that earned surplus would be adjusted?

A. Yes, sir.

Q. In other words, your earned surplus is determined, isn't it, assuming that you have no change in the reserve for depreciation or other asset value, your earned surplus is assets minus liabilities?

A. Yes, sir.

Q. So that any adjustment in the asset or liability side would necessarily adjust the surplus?

A. Yes, sir.

Q. But wouldn't the surplus be the assets minus the liabilities and the capital and that would be the surplus? A. (Nods head.)

Q. I want to check a few specific items, and I will ask you to kindly refer to your accounts payable. Wasn't there an [62] account payable of \$318.50 which was due to Mr. Bart Pugh which was not included in your schedule of accounts payable? A. Yes, sir.

Q. That should be included in your accounts payable?

A. My reason was when I tried to verify this account with the creditors, Pugh was not able to produce any proof.

Q. But it was on the books of the company, wasn't it, as an account payable? A. Yes, sir.

Q. So that will explain to that extent the differ-

(Testimony of Ireneo Viray.)

ence between your and Mr. Kaneshiro's figures of the accounts payable because I believe he had that on in there? A. Yes.

Q. Now, leaving aside all the differences, other differences, between you and Mr. Kaneshiro, let me ask you if you prepared your audit pursuant to the instructions contained in the joint memorandum?

A. Yes, sir.

Q. And did you use standard accounting methods in that? A. Yes, sir.

Q. Let me also ask you if subsequent to your audit you had any meetings and discussions with Mr. Sherwood Wiseman and Mr. Stanley Kaneshiro in resolving any of the differences between your audit and Mr. Kaneshiro's audit?

A. Yes, sir. [63]

Q. Where were those meetings held?

A. I do not remember now, sir, but I believe we held meetings more than three times.

Q. And were you and Mr. Kaneshiro present at those meetings? A. Yes, sir.

Q. Let me ask you were you in agreement and was Mr. Kaneshiro in agreement when Mr. Wiseman made adjustments? Were they acceptable to both of you? A. Yes.

Mr. Turner: That is all the questions I have.

(Testimony of Ireneo Viray.)

Cross-Examination

By Mr. Crain:

Q. Is it correct, Mr. Viray, that you are no longer employed by either Island Service Company or Mr. Hines? A. Yes.

Q. When did you resign from those two jobs?

A. About the middle—about the end of July, 1955.

Q. Is it correct that you severed your connection of your own volition with both Island Service Company and Mr. Hines? A. Yes, sir.

Q. Actually you left a letter on your desk for Mr. Hines telling him that you no longer wished to consider the association, is that right? [64]

A. Yes, sir.

Q. When did you go to work for Butler's, Inc.?

A. August 3.

Q. And the letter that you left for Mr. Hines is dated August 2, 1955, is that correct?

A. I do not remember.

Q. Now, Plaintiff's Exhibit No. 4, Mr. Viray, that you have been testifying from here, is labelled, "Balance Sheet, 29 September, 1952, from tentative trial balance and profit and loss statement," is that correct? A. Yes, sir.

Q. That wasn't your final balance sheet on this audit, was it?

A. I remember I made two balance sheets; I do not know if this is the final one.

(Testimony of Ireneo Viray.)

Q. Is there any way you can refresh your own memory as to the date you prepared this particular balance sheet? A. I do not remember.

Q. Would that not be in your working papers that you have here?

A. It may be in my working papers; it would take time to find it.

Q. Well, you have no date on that particular balance sheet, do you? A. No, sir. [65]

Q. I would show you a carbon copy of that balance sheet and ask you if that is the same as Plaintiff's Exhibit No. 4?

Mr. Turner: Well, if he is going to show anything for the record, your Honor, I want it marked for identification and made a part of the record.

The Court: It has to be identified first.

Mr. Crain: Well, this is a bound volume. Can I have the volume marked for identification?

Mr. Turner: Sure.

The Court: Now just a moment. I am not sure that this objection is valid. You simply asked him if they are alike.

Mr. Turner: Could you read the question?

(The reporter complied with the request.)

Mr. Turner: Well, it is still something that has been testified to and I think it should be marked for identification.

Mr. Crain: Well, it is identical.

The Court: It's a carbon copy.

(Testimony of Ireneo Viray.)

Mr. Turner: Excuse me, I thought it was a different balance sheet.

Q. (By Mr. Crain): Now, is this carbon copy the same as Plaintiff's Exhibit No. 4, Mr. Viray?

A. I do not believe this is a carbon copy.

Q. Well, are they identical insofar as the figures are concerned?

A. So far I have seen the same figures. [66]

Q. Well, is it the same or isn't it?

A. It's the same.

Q. Now the copy which I have, which is identical with Plaintiff's Exhibit No. 4, is bound with a group of other papers, is that correct?

A. Would you repeat your question?

Q. I say this copy of Plaintiff's Exhibit No. 4 is included in a balance sheet of other papers?

A. Yes, sir.

Q. Were these prepared by you and transmitted to me? A. Yes, sir.

Q. Is there a date, a letter of transmittal?

A. Yes, sir.

Q. What is that date? A. May 25, 1954.

Q. In other words, would it be correct, Mr. Viray, to assume that the tentative balance sheet that you have been testifying from here was prepared prior to May 25, 1954? A. I believe so.

Q. Now, isn't it a fact that you prepared a later balance sheet than that particular one that is marked Plaintiff's Exhibit No. 4?

A. I say before I prepared two balance sheets only I do not remember if this one from which I

(Testimony of Ireneo Viray.)

have been testifying was the last one because the first one was only—— [67]

Q. I will show you an item that is labelled, "Island Service Company, Inc., balance sheet as of 29 September, 1952," and ask you if you prepared that? A. Yes, sir.

Mr. Crain: If the court please, I would like to have this marked Defendant's Exhibit A for identification.

The Court: Defendant's Exhibit A for identification?

Mr. Crain: Yes.

Mr. Turner: May I see it?

Q. (By Mr. Crain): Mr. Viray, there is attached to that a second page labelled, "Island Service Company, Inc., Profit and Loss Statement, January 1 to September 29, 1952." Was that an enclosure with this balance sheet at the time they were prepared? A. Yes, sir.

Q. They were prepared together, is that right?

A. Yes, sir.

The Court: You are merely asking now to have it marked as an exhibit? You are not introducing it?

Mr. Crain: Mr. Turner wants them separated but I prefer to keep them together.

The Court: Then it can be marked as an exhibit for identification only, consisting of two pages. If there is any question about it, the clerk will just staple both sheets. We have now reached the recess period. Are our accounts clear [68] as

(Testimony of Ireneo Viray.)

to what Mr. Viray is to do in getting records you need?

Mr. Turner: He is to get the first two schedules. Over here we have 3, 4 and 5. He wants to get Schedules 1 and 2. He says he knows what they are so he will go with Mr. Hines and get them.

The Court: Very well. Will counsel give the clerk all exhibits which have been introduced.

Mr. Crain: May we leave the books here under the cognizance of the clerk during the recess?

The Court: Well, I think you had better put them inside there. They may be perfectly safe in the open but you can't tell. Very well, the court will recess until 1:30 this afternoon.

(The court recessed at 12:00 a.m. and reconvened at 1:30 p.m., October 24, 1955.)

Mr. Crain: May we have Defendant's Exhibit 1 for identification, please, and——

The Clerk: Exhibit A.

Mr. Crain: That is right, and Plaintiff's No. 4.

Q. (By Mr. Crain): Mr. Viray, I would now hand you Defendant's Exhibit A for identification and ask you if this is a balance sheet prepared from the books of Island Service Company, Inc., as of 29 September, 1952?

A. Yes, sir.

Q. And was this prepared by you? [69]

A. Yes, sir.

Q. Did you also prepare the profit and loss statement that is attached to this?

A. Yes, sir.

(Testimony of Ireneo Viray.)

Q. And you attached the two together, is that correct? A. Yes.

Q. Now, this balance sheet bears the name "Viray" in the lower left-hand corner and the date June 23, 1954? A. Yes.

Q. Was that date placed there by you?

A. Yes, sir.

Q. So that this balance sheet was a later statement than the one you have testified on this morning, that is denominated—— A. Yes.

Mr. Crain: If the court please, I would like to introduce this in evidence as Defendant's Exhibit A.

The Court: Well, now, do you want to introduce this at this time or reserve it until you put on your own case?

Mr. Crain: It makes no difference.

The Court: Very well, it will be received without objection.

Mr. Turner: No objection.

Q. (By Mr. Crain): Now, Mr. Viray, there is considerable difference between Defendant's Exhibit A and Plaintiff's Exhibit [70] 4, is there not?

A. There are differences.

Q. Would you take the two and point out to the court the major differences and the major difference in the conclusion that you reached on the latest balance sheet?

Mr. Turner: May the witness be cautioned to refer to each exhibit so that the record will be clear?

Mr. Crain: Yes.

(Testimony of Ireneo Viray.)

Q. (By Mr. Crain): When you speak of this one, refer to Plaintiff's Exhibit No. 4 and this one as Defendant's Exhibit A.

A. Plaintiff's Exhibit 4 shows cash on hand of \$16,690.40 and Defendant's Exhibit A shows cash on hand in the amount of \$6,382.77. The difference is the amount of audit expense attached to it. When I say, "audit expense," it includes the salaries, I mean, the fees paid to consider and salaries paid to Mr. Perez. This difference was later objected to by Mr. Wiseman, contending that audit expense for a prior period should be charged to the current period.

Q. Before you go further, Mr. Viray, as one of the auditors, you felt that the procedure that you had taken here conformed to standard accounting procedure, is that right? A. Yes, sir.

Q. And that the audit expense should be charged back to the period of time that the audit covered?

A. According to accepted accounting methods Mr. Wiseman [71] was correct in charging the audit expense of a previous period to a current period; however, when I read over the agreement again, the agreement meant—at least it meant to me—that those should be charged to the previous period.

Q. In other words, that the parties that were involved should bear the expense in proportion to the interest that they had, is that right?

Mr. Turner: I object to that. In the first place,

(Testimony of Ireneo Viray.)

it doesn't state what the witness said and it calls for a conclusion.

The Court: Well, I understand. Go ahead.

Q. (By Mr. Crain): Go ahead, Mr. Viray.

A. Another major difference in these two exhibits is this: Plaintiff's Exhibit No. 4 shows general accounts receivable of \$64,576.91 and Defendant's Exhibit A shows the same accounts receivable in the amount of \$32,085.12.

The Court: 72?

A. \$32,085.12. This difference was bad debts that were written off. After conferring with Mr. Hines on this account, doubtful accounts receivable, he also agreed, after receiving proof that so many people did not want to confirm their account we——

Q. Before you go further, Mr. Viray, you were working quite closely with those old accounts receivable, were you not? You prepared letters of confirmation that went out to all of [72] those debtors requesting that they confirm the account or bring in substantiating data that they had paid those accounts, is that right?

A. That is right.

Q. What response did you have in your attempts to verify those accounts receivable?

A. We had several flatly deny the accounts and those others who were out of the island already and some accounts which they claim have already been paid.

Q. Who did they claim they had paid the money to?

(Testimony of Ireneo Viray.)

A. To the Island Service Company.

Q. Did they say they had paid the money to Island Service Company or to an individual?

A. I do not remember. I guess there was one, a particular one who said he paid his account to Mr. Perez. I just do not remember who that was.

Q. Mr. Viray, at the time you were conducting this audit were those accounts receivable reasonably current?

A. They were not current. The average ranged from five years, four years, three years.

Q. Actually, the accounts that you wrote off were written off by you according to conservative accounting procedure, were they not?

A. Yes, sir.

Q. And the figure that you have written off as shown in [73] Defendant's Exhibit A is actually a conservative write-off of those bad accounts, is it not?

A. When I made this judgment, sir, I made an explanation on my journal entry explaining that it was deducted entirely out of the accounts receivable with the proviso that in the event there will be one or two who would pay their account that they would be put back again.

Q. Yes, what I am getting at is in writing those accounts off, you were following conservative accounting practice, were you not, because of the age of the accounts and bad response that you had received from the debtors?

(Testimony of Ireneo Viray.)

A. Yes, I thought I was following good accounting procedure.

Q. Go ahead.

A. I guess those are the two major ones.

Q. Those accounts in a great part, then, form the ultimate difference here. On Plaintiff's Exhibit 4 you show an earned surplus to September 29, 1952, of \$61,228.67, is that right? A. Yes, sir.

Q. And on your subsequent balance sheet you show for the same figure, \$19,601.91; is that right?

A. Yes, sir, that is added to the capital earned.

Q. That is the earned surplus which was to be added to the capital, is that right?

A. That is right.

Q. Mr. Viray, is it correct that you were unable to conduct [74] a joint audit of the books of Island Service Company with Mr. Kaneshiro as the instructions which are contained in Plaintiff's Exhibit No. 2 called for?

A. I do not know if the audit was a joint audit. As soon as we started auditing, he made his audit and I made my audit. I mean, he worked alone and I worked alone, but we were working in one office at the same time.

Q. Is it true that he was working all the time you were making your audit?

A. He was working and I was working also.

Q. Was he working or just sitting there, Mr. Viray? A. I think he was working.

Q. During the period of over a year, is it your

(Testimony of Ireneo Viray.)

testimony that Mr. Kaneshiro was working, making an audit at that time?

A. I do not know; I was not particularly watching what he was doing. His work was spread on his table and I had mine on my table.

Q. Each of you conducted two separate audits during the period of a year?

A. Yes, sir, and came up with separate results.

Q. Were you aware that in the years prior to 1952 that the Government of Guam assessed income taxes against the corporation in excess of \$10,000?

A. I do not know what was the result. There was a tax deficiency. [75]

Q. That tax deficiency does not appear in either one of your balance sheets here, does it?

A. No.

Q. And that tax deficiency does not appear on Mr. Kaneshiro's balance sheet?

A. I do not know.

Mr. Crain: May I have Mr. Kaneshiro's? I think it is Plaintiff's Exhibit No. 3.

Q. (By Mr. Crain): Does that tax deficiency appear on Mr. Kaneshiro's balance sheet?

A. I do not think it does.

Q. Now at such time as that tax deficiency is taken up that would be an additional liability of the corporation, would it not, that would tend to reduce the earned surplus figure?

A. Yes, sir, Mr. Wiseman did that already in his adjustments.

Q. At the time that you began your audit, Mr.

(Testimony of Ireneo Viray.)

Viray, did you find there was a complete set of books for Island Service Company?

A. There were complete sets of books but I would not call them complete because some of them were not well done. For instance, the cash book—I found out that only total lump sums were posted in the cash book.

Q. Did you find any other deficiencies insofar as the completeness of the books were [76] concerned?

A. Well, in reconciling the cash receipts, less all cash disbursed, I found some differences.

Q. Were you and Mr. Kaneshiro ever able to resolve your differences?

A. I showed my results to him and he did not agree with me.

Q. On both Plaintiff's Exhibit No. 4 and Defendant's Exhibit A you have set out one item of heavy equipment as an asset at \$5,550. Do you recall what that heavy equipment consisted of?

A. Those were the same figures that I saw in the ledgers of Kaneshiro.

Q. Did that figure represent the purchase of 79 pieces of equipment from the Central Bank of China?

A. I believe so.

Q. Do you find that figure listed as such in Mr. Kaneshiro's balance sheet?

A. It should be here because the record shows that those equipment were entered in the books.

Q. Do you find any item in Mr. Kaneshiro's balance sheet where that figure could be buried?

(Testimony of Ireneo Viray.)

A. I would have no idea.

Q. Now, isn't it a fact that as a result of your auditing of these books you determined that the 79 pieces of equipment purchased by the corporation from the Central Bank of China [77] were separate and different from the pieces of equipment which were to be appraised by the appraisers chosen under the contract that is in question here?

A. I believe so. Those 79 pieces of equipment were a part of those appraisals.

Q. Some of them were? Isn't it a fact, Mr. Viray, that in the course of your audit that 49 pieces of that equipment had disappeared and they are not accounted for on the books of the corporation?

A. Well, in determining what we had sold and what was on hand there was a difference. There should have been more inventory than there proved to be.

Q. So, in other words, this figure you have in your balance sheet showing heavy equipment at \$5,550, that represents 79 pieces of equipment, if they were there, does it not? A. Yes, sir.

Q. And 49 of them were missing, isn't that correct?

A. I wouldn't say that exactly because there may be some more papers which I have not seen.

Q. In other words, in conducting your audit, Mr. Viray, you found much of your supporting data that you needed to make a complete audit missing?

(Testimony of Ireneo Viray.)

A. Most of the papers I wanted were missing.

Q. Did you ever find any of them?

A. No; all of the papers I discovered were missing, I never [78] found.

Q. So that there were large holes in this audit?

Mr. Turner: That is a leading question.

Mr. Crain: I have the witness on cross-examination.

The Court: He denied saying anything about large holes.

Q. (By Mr. Crain): Well, out of 79 pieces of heavy equipment purchased at \$5,550, 49 of them you never found any evidence that they existed, is that right?

Mr. Turner: He said he didn't know how many.

The Court: He testified that he would not draw that conclusion because there may have been equipment sold and so forth for which he didn't have the paper before him.

Q. You were never able to find the substantiating data for the sale of that major portion of that heavy equipment, is that right?

A. I will put it this way, sir, after trying to balance and while we were waiting for confirmation letters to arrive, I have plenty of time so I again checked this equipment—when they were purchased and how they were disposed of, so I wouldn't know; I did not make an official check-up; I only tried to find out.

Q. Now, Mr. Viray, this morning when Mr. Kaneshiro was testifying, he made the statement

(Testimony of Ireneo Viray.)

that he didn't know whether this audit was even complete as yet to this date and as far as he knew it might still be going on. Insofar as you are concerned, [79] have you completed your audit of the books of the Island Service Company?

A. I think I have completed mine.

Mr. Crain: I have no other questions.

Redirect Examination

By Mr. Turner:

Q. Mr. Viray, if I may refer you to Defendant's Exhibit A and Plaintiff's Exhibit 4, you have already testified that the main differences between these two audits are your statement of cash on hand of \$16,690.40 on Plaintiff's Exhibit 4 and \$6,382.77 in the balance sheet which is Defendant's Exhibit A, and I believe you testified that that represented a deduction from the cash on hand of the expenses of the audit, is that correct?

A. Yes, sir.

Q. Let me ask you, as an accounting principle, if you had \$16,690.40 on hand on 29 September, 1952, why would you deduct future expenses from the cash on hand?

A. Because on the basis of the agreement.

Q. I mean, why wouldn't you show it as a liability and still reflect the cash on hand as that actually there?

A. The cash on hand should be \$16,690.40.

(Testimony of Ireneo Viray.)

Q. It should be regardless of the fact that you put it \$6,382.77 on Defendant's Exhibit A?

A. Yes, I deducted from there so that Mr. Wiseman would [80] see if that would be pertinent.

A. I see. Your testimony is that the figure \$16,690.40 correctly reflects the cash on hand regardless of this balance sheet of June 23, 1954?

A. Yes.

Q. Let me also ask you, as an accounting principle, you have referred to the audit expense as expenses of Mr. Kaneshiro. That's payments made to him and those payments were all made subsequent to September 29, 1952?

A. That is correct.

Q. Isn't it true regardless of whether those expenses were incurred or set up on an accrual basis or cash receipts basis, it would not be a charge against the corporation until the month the services were rendered or cash paid to Mr. Kaneshiro?

A. According to accepted accounting methods that would be the correct procedure.

Q. In other words, anything in connection with the expense of the audit which was paid after October 1 would be reflected on the books of the corporation as of October 1 whether on an accrual or cash basis, is that correct? A. Correct.

Q. That also has another practical value that on September 29, 1952, you didn't know how much the audit expenses were going to be, did you?

A. No, sir, we had no idea. [81]

Q. So when you made this adjustment of

(Testimony of Ireneo Viray.)

\$6,382.77 you were adjusting back to September 29, 1952? A. Yes.

Q. So we are assuming this \$16,690.40 is correct? A. Yes.

Q. Wouldn't it hold that if there were any salaries paid to Mr. Perez after September 29, 1952, they would not be earned in the period for which the service had been rendered, right?

A. Right.

Q. And, if I remember, he was to receive a salary of a certain amount until the audit was completed? A. Yes, sir.

Q. So when you took the items off you were in fact deducting expenses that would, accountingwise, be approved in subsequent period?

A. (Nods head.)

Q. And am I also correct that in reconciliation with Mr. Wiseman you accepted his adjusting entries? A. Yes, sir.

Q. Now, turning to the figure for accounts receivable which on your statement of 6/23/54 you reduced from \$64,576.91 to \$32,085.12, is it not true that on the first statement, which is Plaintiff's Exhibit 4, you adopted the accounting procedure of listing the accounts receivable and taking a reserve for bad debts? [82] A. (Nods head.)

Q. But in the statement which is Defendant's Exhibit A you adopted another method of writing off accounts you felt to be bad and not using the reserve method, is that correct? A. Yes, sir.

Q. Now, this corporation was formed in Novem-

(Testimony of Ireneo Viray.)

ber, 1949? A. I think so.

Q. So that as of the 29th of September, 1952, a period would have elapsed of about three years, is that not also correct? A. Yes, sir.

Q. Let me ask you if for accounting purposes it is standard accounting custom and practice, according to accepted doctrine, to write off as a bad debt an account on which the statute of limitations has not passed?

A. Whenever we consider an account as having been refused or flatly denied—I do not believe the statute of limitations was involved.

Q. Well, let me ask you, Mr. Viray, I am interested in determining how you reached this figure of what to write off on June 23, 1954? What factors caused you to write particular accounts off from \$64,576.91 down to \$32,085.12?

A. I made an analysis of all accounts receivable, providing for columns, those who confirmed, those who did not and those out of town.

Q. Did you not testify on direct [83] examination that you just didn't hear from a lot of accounts—they just didn't answer confirming the account?

A. They did not want to confirm the account.

Q. I am trying to distinguish between those who refused to confirm the account and those who did not respond to the mail inquiries.

A. Some didn't respond.

Q. Have you any idea as to percentages of how many did not respond to your inquiries?

(Testimony of Ireneo Viray.)

A. I have no idea now but it should be in the records.

Q. Did you do these by accounts?

A. One by one.

Q. Is there anything over there that shows how you made these adjustments?

A. I believe I have a schedule.

Q. Will you kindly get your schedule, please?

A. This column shows the balance, this column shows they confirmed and the amount.

Q. Let's take the account of Agana Automotive Shop, \$282.

Mr. Turner: Your Honor, if there is no objection, I think I will introduce that into the record.

Mr. Crain: There is also a statement by him as to percentages. I want all of it. I object to that as not being all of the record. Don't you also have a statement reconciling these and showing the percentage of people contacted? [84]

A. I made it up but it is not there now.

Mr. Crain: Well, go ahead with that. Maybe we can find out.

Q. (By Mr. Turner): Let me ask you, Mr. Viray—I show you a nine-page document, all type-written, and ask you if this is the document which you used in determining that you would reduce the general accounts receivable from \$64,576.91 down to \$32,085.12, is that correct? A. Yes, sir.

Mr. Turner: All right. I will move to introduce this as Plaintiff's Exhibit next in order.

Mr. Crain: No objection.

(Testimony of Ireneo Viray.)

Q. (By Mr. Turner): Mr. Kaneshiro, I will ask you—I mean, excuse me, Mr. Viray, for income tax purposes two accounting methods are acceptable with reference to bad debts. One method is a reserve method and the other is an actual deduction of debts as they become bad in the particular calendar year, is that correct? A. Yes.

Q. I understand that the corporation was on the reserve method up until you made the audit which has been labelled Defendant's Exhibit A, June 23, 1954? A. Yes.

Q. The corporation up to that time had always been on the reserve method? [85] A. Yes.

Q. Now, isn't it true that after September up until the time you left the employ of Island Service Company, Inc., you continued on the reserve method? A. We do.

Q. So that the only time you shifted from the reserve method of accounting was on that financial statement of June 23, 1954? A. That is right.

Q. Let me ask you also, after Mr. Wiseman reconciled and set up a reserve for bad debts did the corporation continue to use the figure thereafter? A. Yes.

Q. I see. The corporation accepted Mr. Wiseman's reserve and utilized it thereafter while you were with the corporation? A. Yes.

Q. Now, let's take a particular item here, if we may—Agana Automotive Shop. This is Plaintiff's Exhibit 5, \$282. Your remarks and your code on the initial page shows that the confirmation letter

(Testimony of Ireneo Viray.)

was not returned to the auditors. What did you do with that item? Did you mark it off as a bad debt?

A. That is one of the bad debts I marked off.

Q. Isn't it true that every time the confirmation letter was not returned you marked it off as a bad debt? [86]

A. Yes, if I knew it was not returned.

Q. I have one more item, Guam Commercial Corporation, \$1,953.94; remarks, "CLNR," which means that the confirmation letter was not returned? A. Yes.

Q. Did you consider that a bad debt?

A. Yes.

Q. Isn't it true the corporation owed a lot of money at that time to Island Service Company?

A. Yes, and they him.

Q. Instead of offsetting, you considered this as a bad debt? A. Yes.

Q. But regardless of the finding of \$32,085.12, which you have testified constituted the first and only departure from the reserve method of accounting for accounts receivable of the corporation, you agreed in connection with Mr. Wiseman's reconciliation to restore the accounts receivable and start taking reserve for depreciation?

A. That is right.

Q. Now, there are a couple of other minor items on here, I notice. One is the amount of notes receivable which you have here on Plaintiff's Exhibit 4 as \$1,000, and you have it on this statement of

(Testimony of Ireneo Viray.)

June 23, 1954, as \$850. Can you explain that difference? [87]

A. This \$850 on Defendant's Exhibit A for notes receivable?

Q. Wasn't that the Henry Mar note?

A. No, sir, it is a different notes receivable in that amount. He claimed that he paid that \$1,000 already and I discussed that with Mr. Hines. Mr. Hines produced some receipts where he agreed to pay Mar's account because of so many other accounts. I had to write that off and put in another new one.

Q. And what is that note?

A. This \$850? I do not remember to whom it belongs, but it is not the same \$1,000.

Q. Do I understand, according to your testimony, Mr. Hines personally assumed the obligation to pay Mr. Mar the amount Mr. Mar owed the corporation?

A. Yes, sir, in such a way that the balance was to be deducted and two more accounts were involved.

Q. Had the corporation been paid yet that amount?

A. Well, you see, the time came when Mr. Hines was willing to pay Mar. There were accounts in the accounts receivable that were to be paid by Mar but those were accepted as a partial payment so that there was getting an amount less than those accounts that got involved in the transaction.

Q. Isn't it true that that transaction between

(Testimony of Ireneo Viray.)

Mr. Hines and Mr. Mar took place after September 29, 1952? A. No, I guess it was before. [88]

Q. But you didn't find out about it until the interval between the balance sheet of 29 September, 1952, and the one of June 23, 1954, which is Defendant's Exhibit A? A. Yes.

Q. Isn't it also true that in your conferences with Mr. Wiseman, that is the conferences between Mr. Kaneshiro and yourself, all of the differences between the balance sheet of 29 September, 1952, and the one of June 23, 1954—the major differences which you have discussed and testified to—they were resolved and reconciled? A. Yes, sir.

Q. And you accepted Mr. Wiseman's adjustments to both your balance sheet and Mr. Kaneshiro's balance sheet? A. I did.

Q. Now, just to clear up a minor item, you said that you and Mr. Kaneshiro conducted your audits together? A. He did his separately.

Q. They were both in the same physical location and they went on at the same time chronologically speaking? A. Yes.

Q. Isn't it true he and you discussed certain items and agreed upon them, such as inventory of merchandise?

A. We discussed various items and agreed on some and some we didn't.

Q. Now, wasn't it also true that referring to the joint [89] instructions of Mr. Crain and myself, which I think is Plaintiff's Exhibit 1—

The Clerk: 2.

(Testimony of Ireneo Viray.)

Q. (Continued): 2 and which formed the basis for your audit, the rolling stock, mechanical equipment and fixtures—the value of them was to be fixed by appraisal? A. Yes.

Q. Accordingly referring to the values of fixed assets set forth by you in Plaintiff's Exhibit 4, namely, heavy equipment, automotive equipment and shop equipment, you previously testified that that was the value of that equipment as it was shown on the books of the corporation?

A. Yes.

Q. And that is true also with respect to Defendant's Exhibit A where you have the same value and the same titles on each of those items?

A. Yes.

Q. Under the joint instructions received from Mr. Crain and myself, isn't it true that the values you put on those assets were the appraised values?

A. Yes.

Q. So in accordance with the instructions these values would not be on there—that is the cost value, but you put the appraised value, is that right?

A. That is right, you said the book value. [90]

Q. And the net capital minus the liabilities would be increased or decreased according to whether it was higher or lower than the cost figures you have in here? A. (Nods head.)

Q. Now also on your Plaintiff's Exhibit 4 you showed an earned surplus from January 1, 1952, to September 29, 1952, of \$22,334.74. On Defendant's Exhibit A, which is your balance sheet of 6/23/54

(Testimony of Ireneo Viray.)

you show a loss of \$30,670.96. Now, isn't it true, looking at the profit and loss statement, that the reason for that difference is that you took off bad debts of \$36,944.24? A. Yes, sir.

Q. And if you took the reserve method of bad debt accounting that item would have to come out of there, wouldn't it? A. Yes.

Q. If it was taken out of there it would mean a reduction in the profits? A. (Nods head.)

Q. And is it also true that you took as an expense for the period from January 1 to September 29, 1952, as an operating expense, the expense of an audit which occurred after that period, and that you would have to take that figure out of \$58,000, considerably increasing the cost for the period and reducing the profit?

A. (Nods head.) [91]

Q. And I believe you also testified that for purposes of this audit, the net worth of the corporation, assuming that you did not have a surplus which occurred through revaluation of the equipment, would be the assets minus the liabilities minus the capital account—the result would be the earned surplus? A. (Nods head.)

Q. So that using the method of setting up a reserve for accounts receivable you would end up with a surplus for the entire period, is that correct? A. Correct.

Mr. Turner: That is all.

(Testimony of Ireneo Viray.)

Q. (Continued): 2 and which formed the basis for your audit, the rolling stock, mechanical equipment and fixtures—the value of them was to be fixed by appraisal? A. Yes.

Q. Accordingly referring to the values of fixed assets set forth by you in Plaintiff's Exhibit 4, namely, heavy equipment, automotive equipment and shop equipment, you previously testified that that was the value of that equipment as it was shown on the books of the corporation?

A. Yes.

Q. And that is true also with respect to Defendant's Exhibit A where you have the same value and the same titles on each of those items?

A. Yes.

Q. Under the joint instructions received from Mr. Crain and myself, isn't it true that the values you put on those assets were the appraised values?

A. Yes.

Q. So in accordance with the instructions these values would not be on there—that is the cost value, but you put the appraised value, is that right?

A. That is right, you said the book value. [90]

Q. And the net capital minus the liabilities would be increased or decreased according to whether it was higher or lower than the cost figures you have in here? A. (Nods head.)

Q. Now also on your Plaintiff's Exhibit 4 you showed an earned surplus from January 1, 1952, to September 29, 1952, of \$22,334.74. On Defendant's Exhibit A, which is your balance sheet of 6/23/54,

(Testimony of Ireneo Viray.)

you show a loss of \$30,670.96. Now, isn't it true, looking at the profit and loss statement, that the reason for that difference is that you took off bad debts of \$36,944.24? A. Yes, sir.

Q. And if you took the reserve method of bad debt accounting that item would have to come out of there, wouldn't it? A. Yes.

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Q. And is it also true that you took as an expense for the period from January 1 to September 29, 1952, as an operating expense, the expense of an audit which occurred after that period, and that you would have to take that figure out of \$58,000, considerably increasing the cost for the period and reducing the profit?

A. (Nods head.) [91]

Q. And I believe you also testified that for purposes of this audit, the net worth of the corporation, assuming that you did not have a surplus which occurred through revaluation of the equipment, would be the assets minus the liabilities minus the capital account—the result would be the earned surplus? A. (Nods head.)

Q. So that using the method of setting up a reserve for accounts receivable you would end up with a surplus for the entire period, is that correct? A. Correct.

Mr. Turner: That is all.

(Testimony of Ireneo Viray.)

Recross-Examination

By Mr. Crain:

Q. You have agreed with Mr. Turner that most of the items contained in your balance sheet of June, 1954, should be deleted, but after all the audit expense would fall into a very similar category with the additional taxes owed the Government of Guam for the period 1951 and 1952, would they not? A. I believe so.

Q. And would you say because the Government of Guam——

The Court: I am not following that.

Mr. Crain: Well, it is a similar analogy to these Mr. Turner has been drawing.

The Court: It isn't an analogy at all if you are talking about an additional liability incurred subsequent to—— [92]

Mr. Crain: It was a liability which was not owing September 21, 1952.

The Court: It was owing at the time the audit was made. The other amount was not owing until after the date of the audit.

Mr. Crain: The audit was of benefit to all of the parties to the transaction.

The Court: Well, it may be subject to certain ramifications.

Mr. Crain: That is right. This isn't an audit in the normal course of business as Mr. Turner has tried to slant it in his questioning.

(Testimony of Ireneo Viray.)

The Court: Well, it is a question whether the parties to this action owe it. It has nothing whatever to do with the status of what is due as of September 20, 1952.

Mr. Crain: It does insofar as the ultimate figures that we are going to arrive at. It is going to be the basis of the payment.

The Court: If you are going to talk about a balance sheet of June, 1954, that is one thing, but you are talking about a balance sheet of September 30, 1952.

Mr. Crain: Well, you have a matter of taxes which didn't appear until 1954.

The Court: Taxes were owing?

Mr. Crain: No, but when they appeared on the balance sheet—— [93]

The Court: If they were due they should have been.

Q. (By Mr. Crain): You testified as to accounts receivable and your method of handling them. Refresh your memory with this document. Can you find in the books of the company this same statement as to the percentages of persons you were able to contact for the purpose of verifying the accounts receivable?

A. I do not have it in the books—the total amount was.

Q. This accounts receivable was prepared by you, is that correct? A. It was.

Mr. Turner: Your Honor, I will stipulate with counsel for defendant that he is questioning Mr.

(Testimony of Ireneo Viray.)

Viray with reference to a schedule 3, accounts receivable, which was a part of the working papers in connection with Mr. Viray's audit and that a carbon copy of that may be prepared and inserted in the record.

Mr. Crain: As Defendant's Exhibit 2.

The Court: Very well.

Q. (By Mr. Crain): Mr. Viray, will you read Section 3 into the record?

A. Section 3, accounts receivable; total of accounts receivable as of 29 September, 1952, was \$64,576.91. Confirmation letters were sent out with a view to verifying individual balances and as of October 29, 1952, after a period of thirteen months, the standing of the accounts receivable was as follows: [94] Balance, September 29, 1952, \$64,576.91; payments made between September 29, 1952, and October 29, 1953, \$11,918.72; balance October 29, 1953, \$52,658.19. Above balance analyzed as follows: Accounts confirmed but not yet paid, \$4,605.68; confirmation letters not yet returned up to October 29, 1953, including those who refused to confirm balances alleging that their accounts have already been paid to Joaquin A. Perez, those that could not be located and those that definitely left the island, \$48,052.51.

Q. That is section 3, is that right?

A. That is right.

Q. Now according to that statement which you made, a number of these accounts—the customers

(Testimony of Ireneo Viray.)

verified them by saying that the accounts had been paid to Mr. Joaquin A. Perez, is that correct?

Mr. Turner: I object to that. He testified in his direct testimony there was one man.

The Court: He said there was one man; he didn't know who he was.

Mr. Crain: Here he says it in the plural.

Mr. Turner: No, that is the cumulative.

Q. (By Mr. Crain): Actually, Mr. Viray, most of the confirmation letters that you sent out in attempting to deliver them, some of them were hand-delivered, were they not? A. Yes.

Q. Mr. Turner examined you about the reduction of cash on hand from \$16,690.40. You explained the reason why you had done that and then agreed that it had been improper. However, [95] approximately \$10,000 of that consisted of fees paid to Mr. Kaneshiro and salaries paid to Mr. Perez and which are actually a liability upon the books of the corporation, are they not?

A. That is right, sir.

The Court: Now, just a moment. We are getting confused. They were not a liability on the books of the corporation as of September 30, 1952.

A. They were not a liability on September 30, 1952.

The Court: Exactly, your contract provides that as of October 1 your assets and liabilities are to be determined as of October 1. Consequently any debts which occurred subsequent to October 1 could not

(Testimony of Ireneo Viray.)

properly be included in the determination of the assets and liabilities.

Mr. Crain: Unless it is the court's contention that Mr. Perez should be paid twice, that he should be paid money for doing nothing and then 25 per cent of that——

The Court: I am not concerned with whether Mr. Perez should be paid or shouldn't be paid. We are trying to strike a balance here and your agreement says through October 1. That is as far as I go.

Q. (By Mr. Crain): Mr. Viray, Mr. Turner used the Guam Commercial Corporation of the accounts receivable and questioned you for your reasons for not offsetting a debt of the Guam Commercial Corporation as against one owed to Island Service. Now is that good accounting practice to wipe one out against [96] the other?

A. Well, see, it is like this: This Guam Commercial I wrote off because I believe, if I remember correctly, it was not confirmed and was said to have been paid. I do not exactly remember but there must have been some reason why I did that. I discussed it with Mr. Hines.

Mr. Crain: I have no more questions.

Redirect Examination

By Mr. Turner:

Q. What did you do? You just wrote off every account if the fellow didn't acknowledge he owed you?

A. You see, before I——

(Testimony of Ireneo Viray.)

Mr. Crain: I object to that.

The Court: He is entitled to ask him the question.

Mr. Crain: That is not a question. He is arguing.

The Court: He is asking whether he consulted with Mr. Hines about writing off bad debts. It is at the time when he had exclusive control of the books and the business?

A. Yes.

Mr. Crain: You mean you were influenced by Mr. Hines and not sound accounting procedure?

Mr. Turner: I object.

The Court: Mr. Crain wants to know whether Mr. Hines told you what to do or was it because of good accounting procedure? [97]

A. No, we discussed this accounting procedure together and I asked him if I should write him off and he said "yes" so we write him off with the provision that if anybody pays we would put him back.

Mr. Crain: Is that sound accounting procedure in view of the age of these accounts?

A. If we follow accounting procedure we will make a reserve for these doubtful receivables when we write them off.

Q. (By Mr. Turner): I would like to ask one question. Even though you wrote them off on Defendant's Exhibit A, you carried the account on a reserve basis after that?

A. After that, yes.

(Testimony of Ireneo Viray.)

The Court: Now as I understand it you went over your list of accounts receivable. You sent out letters asking individuals to confirm the account. If they did not confirm the account you charged it off as a bad debt?

A. That is after making the agreement with Mr. Hines.

The Court: Let me direct your attention to an account here—Corn and Murray, address, Ipao; account started March 13, 1952. The amount of the debt is \$4,346.65. You have marked on your list here “CLNR” to mean that the collection letter was not received.

Mr. Crain: Returned.

The Court: Now does that mean that this \$4,346.65 was then charged off as a bad debt on your books? [98]

A. Yes, it was charged as a bad debt on the books because after examining all of the invoices supporting this account, no one invoice was signed by Corn and Murray.

The Court: But you didn't—you say the invoices were not signed by Corn and Murray? Was this not turned over to anybody for collection? Did no one contact either Mr. Corn or Mr. Murray to find out about it?

A. Mr. Hines can better answer that.

The Court: So far as you knew you took this item of \$4,346.65 owed by a well-known firm and just wrote it off as a bad debt?

A. That is the way it appears, sir.

(Testimony of Ireneo Viray.)

Mr. Crain: May I clarify that, your Honor, please?

The Court: Of course.

Recross-Examination

By Mr. Crain:

Q. Mr. Viray, do you remember in the course of this audit there was one item of \$1,500 that was supposed to have been paid by Corn and Murray against that account and another item that was supposed to have been paid against that account which cannot be verified?

A. That was not in the books at all. It was only information received by us from Corn and Murray that they paid Mr. Perez \$1,500, but it was not in the books. [99]

The Court: That still left \$2,800.

Q. (By Mr. Crain): You did not find that entry at all? A. No, sir.

Mr. Crain: I can't testify at the moment but it can be explained.

Mr. Turner: Isn't it true that as far as the assets and liabilities are concerned you still have \$1,500 due?

A. I cannot answer that question because I do not know whether the information is correct or not.

Mr. Turner: What I mean is you wrote it off as a bad debt.

The Court: Here is an item here, Jose S. Camacho, \$6,875.60. Did he pay?

A. We did not write that off, sir.

(Testimony of Ireneo Viray.)

The Court: You charged it here. Did he afterward pay the amount?

A. He is paying it every month.

Mr. Turner: Did you write that off, too?

A. No, sir.

The Court: Now, as I understand it—Guam Commercial Corporation—your books showed that they owed you and that you owed them. Now isn't it proper in accounting practice for you to credit your books with the amount you owed them and send them a receipt for it?

A. That is proper, your honor, but as I say before, I gave [100] this list to Mr. Hines and we discussed it.

The Court: Then is it your statement that Mr. Hines told you to do things which were not good accounting practice?

A. In this particular case?

The Court: As regards the wiping off of bad debts he told you to do things that you would not do in accordance with good accounting practice?

A. It appears like that, sir.

The Court: Very well. Questions?

Mr. Crain: No questions.

Mr. Turner: That is all.

The Court: He said he did these things because Mr. Hines told him to do them and that it wasn't good accounting practice to do it.

Mr. Turner: I have no further questions.

The Court: You may step down, Mr. Viray.

Mr. Turner: Sherwood Wiseman.

MR. SHERWOOD WISEMAN

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address.

A. Sherwood Wiseman, Maite, Barrigada.

Q. What is your occupation, Mr. [101] Wiseman?

A. Accountant.

Q. By whom are you employed?

A. Jones and Guerrero.

Q. And what is your duty at Jones and Guerrero?

A. Chief accountant for Jones and Guerrero.

Q. How long have you held that position?

A. A little over two years.

Q. In the course of your duties with Jones and Guerrero do you have any other accountants or bookkeepers under your supervision?

A. Yes, I have about 15.

Q. And prior to your employment by Jones and Guerrero by whom were you employed?

A. The Government of Guam.

Q. In what capacity?

A. Chief accountant.

Q. And how many accountants and bookkeepers did you have under your direction at that time?

A. Oh, I would say approximately 35.

Q. Mr. Wiseman, were you requested to attempt to reconcile differences in audits conducted

(Testimony of Sherwood Wiseman.)

by Mr. Stanley Kaneshiro and Mr. Viray in connection with Island Service Company?

A. Yes.

Q. And did you, as a result of that request, meet with Mr. Kaneshiro and Mr. Viray for the purpose of reconciling their [103] audits?

A. Yes, I did.

Q. Now in preparation for that reconciliation were you delivered any documents such as an agreement between Mr. Joaquin Perez and Mr. Hines and any other documents?

A. Yes, there was an agreement signed by Perez and Hines and also I had balance sheets submitted by Kaneshiro and Viray.

Q. Now did you familiarize yourself with those documents prior to having the meetings with Mr. Kaneshiro and Mr. Viray?

A. Yes.

Q. And how many meetings did you have with these two gentlemen, that is Mr. Kaneshiro and Mr. Viray?

A. Well, I think I had about five all told.

Q. Where were those meetings held?

A. Well, some of them were held in your office, some of them were held at the office of Jones and Guerrero.

Q. Isn't it true, Mr. Wiseman, that at the meetings held at my office or Jones and Guerrero there was no one present but Mr. Kaneshiro and Mr. Viray?

A. That is right.

Q. They were private, closed meetings?

A. Yes.

(Testimony of Sherwood Wiseman.)

Q. As a result of those meetings did you make any adjustments to Mr. Stanley Kaneshiro's balance sheet of the assets and liabilities, net worth and surplus, of Island Service Company, [103] Inc., as of 29 September, 1952? A. Yes.

Q. Did you make any adjustments in the balance sheet of Mr. Ireneo Viray of September 30, 1952?

A. Yes.

Q. Mr. Wiseman, I will show you two exhibits, one marked Plaintiff's Exhibit 4 and one marked Defendant's Exhibit A, which are two balance sheets prepared by Mr. Viray. You will note that they are both as of September 29, 1952, but they contain some different data. Will you state to the court, if you can, which of these balance sheets was given to you by Mr. Viray for the purpose of making any adjustments? A. Can I—

Q. Yes, if you have some working papers, you may refer to them.

A. I think this is the one. (Indicating.)

Q. In other words, you feel that whatever adjusting entries you made were to Defendant's Exhibit A? A. Yes.

Q. I just want to get the record clear on that point. Will you kindly state, Mr. Wiseman, what adjusting entries you made? May I ask if you brought your original report to the court in connection with these entries? A. Yes.

Q. Will you refer to whatever working papers you require [104] and state the adjusting entries you made to each of the auditor's balance sheets?

(Testimony of Sherwood Wiseman.)

A. Well, to Kaneshiro's balance sheet I made six adjusting entries.

Q. Would you kindly state what they are?

A. The first adjustment was to adjust accounts receivable to agree with the detail of the accounts receivable that was applied by Viray.

Q. What would that adjustment consist of?

A. Well, the effect was to reduce the accounts receivable, the control.

Q. Now you are talking just about Mr. Kaneshiro's accounts receivable? A. Yes.

Mr. Turner: Perhaps the court would like to have Mr. Kaneshiro's balance sheet?

The Court: Well, I have it roughly in mind. His accounts receivable shows roughly something like \$69,000 and a reserve for bad debts.

Q. (By Mr. Turner): How much of an adjustment did you make?

A. I adjusted it \$1,245.26.

Q. Downward? A. Yes.

The Court: What balance did that leave, Mr. Wiseman? [105]

A. Well, there were two subsequent debits to the accounts receivable control which left an adjusted balance of \$70,021.98.

The Court: How much?

A. \$70,021.98.

The Court: Without reference to the reserve?

A. Yes, sir.

Q. (By Mr. Turner): What is your next ad-

(Testimony of Sherwood Wiseman.)

justment in connection with that? We will go ahead. You take it in the order that you have it.

A. The next adjustment was relative to the reserve for bad debts. I increased the reserve for bad debts by \$9,889.37.

Q. Now that is the agreed reserve? Each of them, I believe, used the same figure for reserve, \$6,583.87? A. Yes.

The Court: You increased that to \$16,000?

A. Yes, sir.

Q. (By Mr. Turner): Mr. Wiseman, excuse me—I want to ask you—referring again to Defendant's Exhibit A and Plaintiff's Exhibit 4, you might have been working off of Plaintiff's Exhibit 4 because there is no reserve for bad debts on Defendant's Exhibit A?

A. In my worksheets I don't have any reserve for Viray either. I adjusted later on.

The Court: I would like to have the net on accounts receivable after setting up the reserve for bad debts. It would [106] be roughly \$54,000?

A. Yes, sir, \$53,548.74.

The Court: Do you consider that an adequate reserve in Guam for debts of this character?

A. Well, I had no way of knowing. I didn't know how much work had been done relative to trying to collect the accounts receivable. The statute of limitations hadn't run on a lot of these and I just assumed, after talking with Viray and Kane-shiro, at least some work could be done on the re-

(Testimony of Sherwood Wiseman.)

ceivables that hadn't been done before. I was led to believe that.

The Court: Your reserve was roughly 23 per cent?

A. Yes, sir.

Q. (By Mr. Turner): Was that increase in reserve accepted by Mr. Kaneshiro and Mr. Viray?

A. Yes, I think it was.

The Court: What figure do you recite?

Mr. Turner: Well, he used that \$70,000 figure less the reserve; that is where he get a net figure of \$53,548.74, isn't that correct?

A. Yes, sir.

Q. What is your next adjusting entry for Mr. Kaneshiro?

A. Let's see—I adjusted merchandise in transit of Kaneshiro's by \$10,132.19.

Q. Is that Kaneshiro?

A. Yes, and the offset credit to that was to drafts payable [107] of \$10,132.19.

Q. I see. The draft would come in and you increased the amounts of drafts payable and the amount of the merchandise in transit offsets the liability?

A. Yes.

Q. OK?

A. I adjusted the accounts receivable upward \$500 to take care of the account of Felix Torres Triangle Store.

Q. I see. Now just to save time, is that a situation where a check had been given to an employee I mean gone through Felix Torres' store and they

(Testimony of Sherwood Wiseman.)

had forgotten to stop payment on it and it was cashed twice? A. Yes.

Q. What is the next one?

A. I made an adjustment increasing accounts receivable again by \$1,000 and the offset to that was to notes receivable; in other words, it was merely a reclassification of an item from accounts receivable to notes receivable.

Q. It didn't affect the balance sheet?

A. No, it had no effect.

Q. Next?

A. I increased notes receivable \$850 to bring on the books a note from Juan M. Santos.

Q. Had that previously been on the books at all?

A. No, I don't think so. [108]

Q. All right, your next one?

A. The next one—I decreased accounts payable by \$318.50, which represented an item supposedly due Bart Pugh and after discussing this item, we determined that it was not collectible. In other words, there wasn't enough for him to substantiate the item. The next adjustment was \$348 to adjust cash on hand as of the balance sheet date.

Q. What did that represent?

A. My note says "cash chits turned over to Mr. Hines on balance sheet date," and this item was agreed upon by Kaneshiro and Viray both. Adjustment No. 9 was to increase the reserve for income taxes by \$10,903.79.

Q. What did that represent?

(Testimony of Sherwood Wiseman.)

A. To cover the tax deficiencies, penalties and interest for the tax years '51 and '52.

Q. Do I understand that you had checked with the tax authorities and they had made an assessment?

A. I didn't get anything in writing from them. I applied for it and they never replied to my request.

Q. This figure represents the amount you were orally told?

A. Yes. That is all the adjustments I made on Kaneshiro's balance sheet.

Q. Would you go ahead with Viray's adjustments?

A. All right, the first adjustment was debiting cash on hand [109] for \$397.73. That represented a difference on taxes, withholding taxes of \$172.13 and another adjustment for \$100, which made a total of \$272.13.

Q. Were those withholding taxes that he had withheld but not reflected in cash?

A. That is the \$272.13. There was another adjustment for \$100.60 relative to additional withholding taxes and a \$25 item for petty cash that was on hand, making a total of \$397.73. Adjustment 2, I set up prepaid expenses, \$545.28. It wasn't on Viray's balance sheet.

Q. But they were actual prepaid expenses?

A. Yes.

Q. They were agreed to by Mr. Viray and Mr. Kaneshiro?

(Testimony of Sherwood Wiseman.)

A. Yes, sir. Adjustment No. 3 I increased accounts receivable of Mr. Viray's figures by \$36,436.86.

Q. In other words, to restore to the full accounts receivable and take out the reserve for bad debts?

A. Yes, that is exactly what it was. The fourth adjustment, I set up a reserve of \$16,473.24.

Q. For the accounts receivable?

A. Yes, that reserve then tied in with the adjustment of the reserve Kaneshiro had. Adjustment No. 5, I increased the figure for the buildings, \$4,366.59, to bring the buildings into agreement with what Kaneshiro had and this was also agreed [110] upon.

Q. By Mr. Viray? A. By both.

Q. In other words that represented the agreed figure of both of them as to the value of the buildings?

A. Yes. Adjustment 6 I decreased the reserve for depreciation by \$7,004.08 because we were going to——

Q. Let me ask, Mr. Wiseman, was that to offset out the depreciation on the machinery which was to be appraised?

A. Well, it covered the heavy equipment, automotive and shop equipment, and the net was \$7,004.08. These items would depreciate, but according to the agreement they were to be valued at a certain date, which would have nothing to do with depreciation. Item 7, I increased the equipment

(Testimony of Sherwood Wiseman.)

account by decreasing heavy equipment by \$5,550, decreased automotive equipment by \$5,200 and decreased shop equipment by \$1,695. A portion of this is reclassification into something comparable to what Kaneshiro had, just classification of items.

Q. Let me ask you—in that adjusting entry you took out the cost and depreciation basis for that heavy machinery and so on and made adjustments for the appraised value of it? A. Yes.

Q. But if the actual figure determined as to the value is different from your adjusting entry that would either increase or decrease the surplus?

A. Yes. Adjustment 8, I brought on Viray's balance sheet \$10,132.19, which represented merchandise in transit. This is [111] comparable to adjustment No. 3 in Kaneshiro's adjustments. Item 9—I set up a suspense account of \$500 and credited an account called J. A. Perez clearing account. This was to reverse the entry that Viray had made and the reason for that was that on the duplicate check that we talked about before the \$500 was involved in that and we set it up in a suspense account until it could be cleared away. Adjustment No. 10, I increased accounts receivable by \$500, which is the Felix Torres receivable. Adjustment No. 11, I increased cash on hand by \$10,307.63 and I debited sundry accounts payable \$4,113.40, credited salaries and wages \$6,000 and credited audit expense, \$8,408.53.

Q. Let me ask this—this restoring of cash of \$10,307 is to restore Mr. Viray's cash on hand

(Testimony of Sherwood Wiseman.)

figure to the amount that was actually on hand of \$16,690.40? A. You mean \$10,307.63?

Q. Yes, that restored the \$16,690.40?

A. Yes, that is right.

Q. Let me ask you why did you set up the audit expense as a liability, or did you do that?

A. No, I wiped it out.

Q. All right, what is your next item? Was that on the basis that that was not a liability as of October 1, 1952?

A. I did not consider it so. Adjustment No. 12, I set up an item of suspense of \$3,206.03 and credited sundry accounts [112] payable. This adjustment reversed adjusting entry No. 12 of Viray's. This was my comment here: Mr. Viray made this entry on the premise Mr. Hines points out that to the best of his recollection the company does not owe Perez any amount for coral unless proven otherwise. The account was already on the books and normally I couldn't see why it should be taken back out. Just because I restored it again doesn't mean I approved the account.

Q. Viray had no basis for removing the account?

A. No. No. 13, I set up and credited J. A. Perez clearing account for the same amount. That again was a reversing entry of an entry made by Viray where I didn't think he had sufficient basis for doing so.

Q. Let me ask you—isn't it true that even with that clearing account in there it doesn't affect the net worth and surplus of the corporation because

(Testimony of Sherwood Wiseman.)

with a clearing account on the expense account you have the same item both on the assets and liabilities side, so taking it out didn't change it?

A. No, merely classified it.

Q. Any more adjusting entries?

A. No. 14, I made a credit to a suspense account for \$14.03 to set into suspense an error between the detail and control that Viray had. No. 15, I set up an accounts receivable for Cristobal Hines for \$1,000 and credited Cristobal Hines for \$1,000, which is really an accounts receivable. It is [113] just a reclassifying entry. Adjustment 16 was for \$14.02 crediting Cristobal C. Hines which deleted the account. There was no basis for the \$14.02. Adjustment 17, I decreased accounts payable by \$2,296.03, which took out of the accounts payable, or adjusted the accounts payable to Perez relative to some coral. The unit price was wrong the way it was originally set up.

Q. Oh, I see—in computing liability you found the wrong unit price had been used and it was necessary to adjust it?

A. Adjustment 18, I credited cash on hand \$348 to bring that into agreement with the adjustment I made on Kaneshiro's balance sheet. Adjustment 19, I set up a reserve for income tax for \$10,903.79.

Q. Is that in addition?

A. No, this is on Viray's balance sheet and the other entries are on Kaneshiro's balance sheet. When I made an adjustment on one balance sheet I made a counter entry on the other one to keep

(Testimony of Sherwood Wiseman.)

them in agreement all the way through. That is all the adjusting entries.

Q. Now after you made those adjusting entries did you prepare comparative balance sheets showing those adjustments? A. Yes, I did.

Q. Would you kindly just pull that out?

Mr. Turner: Would you mark this Plaintiff's Exhibit next [114] in order for identification?

The Court: No. 6.

Q. (By Mr. Turner): Did Mr. Kaneshiro and Viray accept all of those adjusting entries?

A. I think they did, yes.

Q. I show you a document marked Plaintiff's Exhibit 6 and ask you if you recognize that?

A. Yes, it's the balance sheet I prepared from these adjustments.

Q. Does this therefore represent the comparative balance sheets of Mr. Viray and Mr. Kaneshiro with the adjustments thereto that they agreed to?

A. Yes.

Mr. Turner: Mr. Crain will ask a question voir dire before——

The Court: I think we will take a 15-minute recess at this time.

Mr. Turner: Mr. Wiseman has a ship leaving. I thought maybe if Mr. Crain—he is supposed to sign a document—I think we could finish with him in four or five minutes and not delay him.

Mr. Crain: No, I think it will take longer.

Mr. Turner: It will foul you up. When does your ship leave?

(Testimony of Sherwood Wiseman.)

A. 5 o'clock. I have to be there an hour and a half ahead.

Mr. Turner: A ship is leaving and he is the only one [115] authorized to sign the document to clear it out.

The Court: Well, he mentioned an hour and a half. I think Mr. Wiseman should be excused until 9:30 tomorrow morning and you understand, of course, that your exhibit is not admitted until after cross-examination and then you can continue your cross-examination until we meet again. I think you have evidence, do you not, on inventory and so forth?

Mr. Turner: Yes, I can put that on.

The Court: So you run along, Mr. Wiseman, and be in court at 9:30 tomorrow morning.

(The court recessed at 3:15 p.m. October 24, 1955, and reconvened at 3:30 p.m. October 24, 1955.)

Mr. Turner: If the court please, I want to clear up one item so I don't forget it. It is my understanding that the agreement called for the fact that Crain and Phelan and L. Turner were to reconcile the differences after an audit. It is my understanding that no reconciliation is possible.

Mr. Crain: That wasn't my understanding.

Mr. Turner: The only difference is that I would have to get on the stand and testify that it is my understanding you stated at the pre-trial conference there was no agreement to any item.

Mr. Crain: My contention is that I said there was never any attempt at any agreement.

The Court: Well, there was no agreement and the entire [116] contract was in dispute.

Mr. Turner: That is what I understood and I have been unable to reconcile with Mr. Crain. All right, call Mr. Forkner.

MR. SPENCER M. FORKNER

called as a witness by the plaintiff, was duly sworn and testified as follows.

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address.

A. Spencer M. Forkner, Maite, Barrigada.

Q. What is your occupation, Mr. Forkner?

A. Equipment and salvage dealer.

Q. How long have you been so engaged?

A. Fifteen years.

Q. During the course of your occupation for the last 15 years have you had occasion to buy and sell heavy equipment? A. I have.

Q. Has that been in the territory of Guam?

A. Yes.

Q. State approximately how many items of heavy equipment you may have purchased and sold in the territory of Guam during the period you have been here. A. 1,200.

Q. And over what period has that [117] extended? A. Five years.

(Testimony of Spencer M. Forkner.)

Q. Have you also appraised the value of items although you have not actually purchased them?

A. I have.

Q. And that is in excess and beyond the 1,200 pieces you testified you bought and sold?

A. That is right.

Q. Now in appraising the value of a piece of heavy equipment or rolling stock what price do you—

The Court: I wonder—I don't like to interrupt—but I wonder if Mr. Forkner would define for us just what is meant by "heavy equipment"?

A. Anything above a two-and-a-half-ton truck.

Q. (By Mr. Turner): And what would the definition of rolling stock be separate from heavy equipment?

A. Well, rolling stock is usually trailers, trucks, graders, anything that moves on rubber.

Q. And rolling stock may also be heavy equipment?

A. It can be, yes. You can call a bulldozer rolling stock. Many times it is called that.

Q. Is there such a term as light equipment for anything below two and a half tons?

A. Usually pickups are considered light equipment.

Q. In appraising the value of both heavy and light equipment how do you compute the price or value? [118]

A. Well, usually, on the market condition,

(Testimony of Spencer M. Forkner.)

whether it is useable or whether it can be used for parts.

Q. Mr. Forkner, did you have occasion some time in the year 1953 to appraise certain heavy and light equipment of Island Service Company, Inc.?

A. I did.

Q. Now in connection with making that appraisal you gave them instructions on how the appraisal was to be made?

A. Well, the only instruction was what it was worth at the time.

Q. At what time?

A. At the time when we made the appraisal.

Q. From whom did you get these instructions?

A. I believe Mr. Crain is the one that asked me to make the appraisal.

Q. Do you know whether you were requested to make your appraisal as of October 1, 1952, or as of the date you made the actual appraisal?

A. I don't recall now, Mr. Turner.

Q. In connection with any appraisal that you made can you tell me whether it was as of the date of your appraisal or as of October 1, 1952?

A. It was the date of my appraisal.

Q. From your knowledge and experience, taking into consideration the depreciation or where it would be during the [119] period from October 1, 1952, to the date of your appraisal, would you say that your appraisal would be higher or lower, taking into consideration also the market from October 1, 1952?

(Testimony of Spencer M. Forkner.)

A. There would be very little difference—about the same.

Q. I show you a three-page document and ask you if you recognize it?

A. It appears to be the appraisal that I made.

Q. From your recollection this is your appraisal?

A. That is right.

Mr. Turner: May it be admitted without objection, your Honor?

The Court: Very well, it will be received.

Mr. Turner: Plaintiff's Exhibit next in order. Your Honor, by the time court meets tomorrow morning counsel and I will check the total amount.

Q. (By Mr. Turner): Mr. Forkner, I am going to give you Plaintiff's Exhibit No. 7 and ask you where the material or items were that you appraised? Do you remember where they were located?

A. They were at the Island Service yard at Tamuning.

Q. And were all of them there or some of them?

A. As I recall they were all there to the best of my knowledge. I am sure that they were all there.

Q. Is it possible that some of them could have been out [120] at the coral pit?

A. I don't recall right now, Mr. Turner.

Q. And this estimate of the value represents what you considered to be the market value of each item of equipment?

A. That is right, either as useable or as parts.

Q. And how much of an inspection did you make of each item from your recollection?

(Testimony of Spencer M. Forkner.)

A. Well, I spent most of a whole day on it.

Q. Now I am referring to—let's take an item—this bulldozer TD18—referring to the fourth item down on your appraisal, TD18 bulldozer—

A. Yes.

Q. You appraised it at \$3,000?

A. That is right.

Q. What particular factors, if you remember, caused you to fix that price of \$3,000? Do you remember the condition of it?

A. Yes, it was not in operating condition. The rear pinion in the rear end was gone and it was disassembled and that is why it was not worth any more.

Q. If it had been in operating condition how much would you have appraised it?

A. At the time about \$4,500.

Q. Would you under any circumstances have considered that \$500 was the market value of that piece at that time? [121]

A. At that time I would say it was worth more than that.

Q. You would have been willing to pay more than \$500?

A. That is right.

Q. Going down to another item here, this Adams grader, do you happen to remember it particularly?

A. I don't recall it too well at the present time, Mr. Turner.

Q. Do you remember the Northwest 25 shovel?

A. Yes.

Q. What condition was it in?

(Testimony of Spencer M. Forkner.)

A. It was in operating condition.

Q. And based on its operating condition did you reach a reasonable market value?

A. I thought it was the reasonable market value.

Q. Do you remember the gas tanker, 3,900 gallons, that you have appraised at \$800?

Mr. Crain: If you please, would you try to count these and refer to these by number so that we can all find them?

The Court: You are referring now to a 3,900-gallon gas tanker?

Mr. Turner: Yes, it must be on the same page—the middle of page 2. You have a value of \$800 for that item particularly.

A. Offhand I can't recall; it's been quite some time ago.

Q. Do you remember the International wrecker 361B? It's [122] the last item, probably, toward the bottom of page 1. You have it appraised at \$600.

A. Yes.

Q. Do you remember its condition?

A. As I recall I believe it was in operating condition, that particular one—I think it was.

Q. And in operating condition you felt \$600 a reasonable market value? A. That is right.

Q. Do you remember a lathe?

A. I don't—vaguely, just vaguely.

Q. Now when you testified to market value do you mean the market value in Guam as of the time of your appraisal?

(Testimony of Spencer M. Forkner.)

A. I meant the market value in Guam, yes, that is right.

Q. There would have been little difference between the amounts as you appraised them and if they had been appraised as of October 1, 1952?

A. Would you state that question again?

Q. Well, when did you make your appraisal? I will withdraw the question.

A. Actually I couldn't tell you exactly when we made the appraisal. Somebody must have that record.

Q. Do you remember what year it was in?

The Court: Well, he has testified it was '53.

Q. (By Mr. Turner): I think you testified earlier there [123] would have been little difference in that market value and October 1, 1952?

A. That is right.

Q. Mr. Forkner, I will show you a piece of paper and ask you if you recognize it?

A. Yes, sir.

Q. What is that document?

A. It's a document stating that Mr. Norris would be the third appraiser.

Q. And that is signed by you?

A. That is signed by me, yes.

Mr. Turner: I am offering it in evidence. I want to know if you have any objection?

Mr. Crain: No objection.

The Court: Without objection it will be received.

Q. (By Mr. Turner): Mr. Forkner, referring to Plaintiff's Exhibit 8, you and Mr. Lathrop, as stated therein appointed Mr. Norris as a third

(Testimony of Spencer M. Forkner.)

appraiser? A. That is right.

Mr. Turner: That is all the questions I have.

Mr. Crain: May I have that, please, Cris?

Cross-Examination

By Mr. Crain:

Q. Do you recall where you signed this statement, Plaintiff's Exhibit 8, Mr. Forkner? [124]

A. Do I recall——

Q. Where you signed it?

A. No, I don't recall.

Q. Do you recall who presented it to you?

A. Mr. Lathrop.

Q. Did you write Mr. Norris' name in the body of that document? A. No, I did not.

Q. At that time did you know Mr. Norris?

A. Vaguely.

Q. Did you know him as an equipment man, a person experienced in buying and selling and appraisal of equipment?

A. All I knew he was taking Mr. Lathrop's place in Koster and Whyte as their equipment man. I met him twice.

Q. Did Mr. Lathrop give you any reason why he wanted you to sign it?

A. Mr. Lathrop was leaving himself; I know that. He was going to the Philippines and he said he thought Mr. Norris was a competent man.

Q. And it was on Mr. Lathrop's representation that Mr. Norris was a competent man that you agreed to sign this document for him?

(Testimony of Spencer M. Forkner.)

A. That is right.

Q. On the appraisal itself Mr. Turner has questioned you particularly concerning item No. 4 on page 1, a TD18 [125] bulldozer? A. Yes.

Q. And you testified that that piece of equipment had the differential dismantled and gone, is that right? A. That is right.

Q. In appraising that piece of equipment were you considering its actual market value in Guam at that time or its value to you on the basis of perhaps you owned other TD18's?

A. Well, that is what I would have paid for it because I owned other TD18's and I had the parts to fix it up.

Q. You could have fixed it up or you could have used parts out of the other TD18's to fix it up, is that right? A. Yes.

Q. Would that particular piece of equipment be worth \$3,000 at that time?

A. It depends on what use a person might have for it and if they had the parts available.

Q. You were peculiarly in that position, is that right? A. I had parts.

Mr. Turner: I object. Mr. Crain says you were "peculiarly" in that position. It doesn't mean he was the only one.

Q. (By Mr. Crain): Do you know anyone else on the island who was in the market for the hulk of a TD18 at that time?

A. Well, I wouldn't know.

Q. Now on page 1 again of the list of equipment,

(Testimony of Spencer M. Forkner.)

beginning [126] with item 5, taking items 5, 6, 7, 8, 9, 10, 11, 12 and 13, those are all trucks—the valuation that you placed on those trucks was for what? For those to be used as trucks?

A. Most of these were not in operable condition; they were for parts.

Q. This evaluation that you placed upon those trucks then was the value of the parts that could have been removed from them?

A. That is right.

Q. Was this value that you placed on these particular items the value of those parts after the trucks had been dismantled or as they sat?

A. Well, I considered it after they were dismantled.

Q. After they were dismantled? In other words as they sat they would have been worth a lesser amount than the figures that you have appraised them here?

A. I believe at the time I mentioned that was what we would pay for the parts after they were dismantled.

Q. After they were dismantled?

A. Right.

Q. What would you estimate, Mr. Forkner, that it would cost in proportion in connection with the appraised figures you have given for these trucks—what proportion would it cost to pay for labor and dismantling?

A. It cost us \$30 apiece; that is what we do it

(Testimony of Spencer M. Forkner.)

for; [127] maybe some people do it cheaper; I don't know.

Q. Now would the same situation pertain to the five gas tankers that are toward the bottom of page 1? There are five gas tankers of 2,000 gallons each, with a total evaluation of \$610. Were they also only appraised for parts?

A. I recall that some of them were and some of them weren't. I can't exactly recall which was and which weren't. I believe there was one good one in there.

Q. One good one and four bad ones and you would say the same thing would apply—a \$30 reduction in the value of each of the others for dismantling? A. Or whatever it might cost.

The Court: Before you leave page 1 on the sheet I have there are three lowboys shown.

Mr. Crain: Oh, our page is different. I am sorry, your Honor. These are made out on a longer sheet and have more items on them.

The Court: Mine shows one lowboy, \$100; one lowboy, \$300; and one lowboy, Frank D. Perez & Brothers. They are not extended to any evaluation. Do your copies show an evaluation?

Mr. Crain: It is my recollection that the one at Frank D. Perez' he claims is his own, is that right, Mr. Turner?

A. These five gas tankers—I am sorry; I was looking at the trucks.

Mr. Turner: The lowboy at Frank D. Perez' belongs to the corporation. [128]

(Testimony of Spencer M. Forkner.)

The Court: My point is these values of the three lowboys are not extended on my sheet.

Mr. Crain: They are not extended, no.

The Court: If you are going to compile this, you have to have a figure on those three lowboys.

Q. (By Mr. Crain): Do you recall the lowboy trailer that is listed here as being at Frank D. Perez Brothers, or did you ever see that one?

A. I never saw it.

Q. On the bottom of page 1 of this——

The Court: Now Mr. Forkner has explained that he may have misunderstood your question as to the gas tankers.

Q. (By Mr. Crain): Let's go back to the five tankers. Were those, in your estimation, only to be cut up for parts?

A. I was thinking of the scrap iron and the value of the tires.

Q. Scrap iron and tires?

A. That is right.

Q. You feel that your evaluation then for those purposes is correct? A. I think so.

Q. OK what about the two items further down, the dump truck without an engine?

A. That was for parts.

Q. That would be subject to a \$30 reduction, is that [129] correct? Prior to the time of the appraisal of this equipment, Mr. Forkner, were you acquainted with Mr. Lathrop?

A. Yes, I was.

(Testimony of Spencer M. Forkner.)

Q. Was he engaged in the buying and selling of heavy equipment in Guam to your knowledge?

A. I believe he was on the side, yes. He was working for Koster and Whyte and buying equipment and shipping it to Manila.

Q. To the best of your recollection did you make your appraisal fairly close in point of time to when Mr. Lathrop made his?

A. I don't know when he made his.

Mr. Crain: I have no further questions.

Redirect Examination

By Mr. Turner:

Q. Mr. Forkner, you testified in connection with items that you have on there which you were going to use for spare parts and it would cost you \$30 to develop the spare parts, but these are the figures you felt each piece of equipment would reach without being torn down?

A. That is the price I thought they were worth; whether they could tear them down for \$30 I don't know.

Q. Would you buy them for the figures you have there?

A. I would if they were torn down.

Mr. Turner: That is all I have. [130]

Mr. Crain: I have nothing further.

The Court: Thank you for coming.

Mr. Turner: Your honor, at this time, pursuant to discussion about the deposition this morning, I

would like to offer in evidence the deposition of Mr. Lathrop and a copy of the appraisal to attach to it.

The Court: I have one deposition here.

Mr. Turner: That is Mr. Schwendinger's. I feel that this should be made available to Mr. Crain overnight for study because he hasn't gotten a copy.

Mr. Crain: I don't think I need it overnight.

Mr. Turner: This is the copy I have.

Mr. Crain: That I never did see.

Mr. Turner: Well, the original was sent to Manila and I made this. You remember I sent all my copies to Manila. So may this be attached as a copy?

Mr. Crain: The originals are to be substituted for those pursuant to the rules of the court.

The Court: Now are you introducing your deposition with the understanding that it represents an exact copy of the original and the original shall be substituted when it arrives?

Mr. Turner: This copy is certified to by the vice counsel as a true and correct copy except for the one exhibit which we are submitting here.

The Court: Is that exhibit attached to the original? [131]

Mr. Turner: Yes.

The Court: You want to stipulate to its admission, subject to check with the original when it arrives?

Mr. Turner: For substitution by the original.

Mr. Crain: What about objections that may have been made by counsel?

Mr. Turner: Well, I have gone through it. I

found no objections. I would say it could be admitted subject to your objections after study. There were no objections by counsel and I have read the thing entirely through.

Mr. Crain: Well, on that basis.

Mr. Turner: Yes, sure, any objections reserved subject to determination by the court.

The Court: If I understand correctly, counsel stipulate that this deposition is a true and correct copy of the original?

Mr. Turner: The deposition of Walter Lathrop.

The Court: And that no objections are raised as to any irregularity of the taking, but the duplicate shall be withdrawn if and when the original arrives and the original substituted for it; that there is attached to this deposition a schedule or an exhibit and that that is accepted as being a true and correct copy of the original exhibit, which is attached to it?

Mr. Crain: The original deposition. [132]

The Court: To the original deposition and it may also be substituted for the original. Very well, is it further stipulated that that deposition shall appear in the record as part of the transcript and that the court may read it and it need not be read aloud?

Mr. Turner: Right, so stipulated and also, your honor, that is, after perusal, if there are any objections by opposing counsel, they may be raised by Mr. Crain and passed upon by the court.

Mr. Crain: Right.

Mr. Turner: Your honor, would the court care for a short recess?

The Court: Well, it's going to take me a few minutes to read this. If counsel want to amuse themselves in some other fashion, they may do so. These items that Mr. Lathrop appraised are not in all respects as Mr. Forkner's.

Mr. Turner: They are not in the same order, Judge.

The Court: He is referring here to some pumps. I don't recall any pumps on Mr. Forkner's.

Mr. Turner: What is the designation of the item on Mr. Lathrop's?

The Court: Well, it is item 9 on page 3, which reads "3 grease pumps (New) heavy duty." The word "new" is inserted in parentheses, and I ask you why you use that description?

Mr. Crain: On Mr. Forkner's they are on page 3 and I [133] think they are listed as "lube pumps." They are listed in the items in warehouse 1.

Mr. Turner: Just a little different nomenclature.

The Court: His evaluation here is \$50 each. Mr. Lathrop's evaluation is \$50 each. This reads: "Q. I show you item 15 on page 3, Annex A, which reads: 3# Grease Pumps (New) Heavy Duty; where the word "new" is inserted in parentheses, and I ask you to explain why you used that description? A. These pumps were brand new. They had been purchased in the United States but were never installed. They were in crates. Q. How did you fix the value of \$150 opposite that item? A. That is the approximate value of that piece of machinery."

Would these be the same pumps as Mr. Forkner put down at \$15 each?

Mr. Turner: I guess so.

Mr. Crain: I am sure they must be because they were in the warehouse.

The Court: Do I understand that Mr. Crain wanted to read this deposition overnight?

Mr. Turner: Would you like to read it overnight? I imagine you would.

Mr. Crain: It would be preferred, your honor, because the copy now and the original cannot possibly get in here before Wednesday morning, so if it could be made available to me tonight along with the exhibit, I would appreciate it.

The Court: You don't have Mr. Forkner's [134] total?

Mr. Turner: Well, Mr. Crain and I will agree upon the mathematical total and stipulate to the court.

The Court: Would you further stipulate that Mr. Lathrop's appraisal is of the same items as Mr. Forkner's?

Mr. Crain: In checking the four appraisals that we have there are certain items missing from each one that each appraiser missed, and they didn't miss the same items.

Mr. Turner: But I would say, wouldn't you, that they substantially appraised the same items?

Mr. Crain: Substantially, yes.

The Court: Substantially is somewhat lacking in accuracy.

Mr. Crain: Mr. Viray made a comparative anal-

ysis of the four appraisals which I think we probably will want to furnish to the court.

The Court: Well, Mr. Turner agrees that Mr. Crain may take these overnight.

Mr. Turner: We have a comparative analysis that I think tomorrow we can stipulate after they are all in to give you, your honor.

The Court: Very well.

Mr. Turner: We will call James Norris as our next witness.

JAMES NORRIS

called as a witness by the plaintiff, was duly sworn and testified as follows: [135]

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address.

A. James Norris, Koster and Whyte Construction Company.

Q. Are you employed by Koster and Whyte?

A. That is right.

Q. How long have you been so employed?

A. Four years.

Q. And what is your present position with Koster and White?

A. Mechanical superintendent.

Q. Have you had that position for the last four years? A. I have.

Q. How much of that has been in Guam?

A. All four years.

(Testimony of James Norris.)

Q. During the course of your time as mechanical superintendent of Koster and Whyte have you had occasion to buy and sell heavy and light equipment?

A. For the last two and a half years that's what I have been doing most of the time.

Q. Where did you purchase this heavy equipment?

A. From all places, sir, plus bid, wherever we can pick it up.

Q. Have you purchased any in Guam?

A. Yes, we have. [136]

Q. You say you have been so engaged for approximately two and a half years?

A. Approximately two and a half.

Q. Prior to the past two and a half years have you had any experience in purchase of heavy and light equipment? A. I have.

Q. Prior to the past two and a half years have you had any experience in the purchase of heavy and light equipment? A. Yes, I have.

Q. Where? A. In Kansas City, Missouri.

Q. For how long were you so engaged in Kansas City? A. About four years.

Q. Did you come to Guam in the employ of Koster and Whyte? A. No, I did not.

Q. For whom did you come?

A. For Morris and Knudsen.

Q. What did you do with them?

A. I was repairman in charge of the shops.

Q. Did you buy heavy equipment?

(Testimony of James Norris.)

A. I bought parts but at the time there was very little bought here in Guam; it was off-island.

Q. You testified in Kansas City you purchased heavy and light equipment. Was that for your own account?

A. For Sullivan Motor Company. [137]

Q. New, used or both?

A. Both new and for resale.

Q. In the last two and a half years have you bought used equipment or new or both?

A. Both.

Q. How many items would you state you purchased in the last two and a half years for Koster and Whyte?

Mr. Crain: If the court please, I would object to that because it covers a period of time considerably subsequent to 1 October, 1952.

The Court: Possibly you can stipulate to his qualifications?

Q. (By Mr. Turner). Prior to, say, the middle of 1953 how much experience had you had in Guam in purchasing heavy and light equipment, new and used?

A. In Guam?

Q. Yes. A. About two years.

Q. And during that two years can you state to the court how many items you purchased or sold?

A. Well, that would be hard to state. It was buying and selling, trading.

Q. Did you have occasion in 1953 to appraise any equipment that Island Service Company, Inc., had?

(Testimony of James Norris.)

A. I appraised the equipment of Island Equipment Company in [138] late '53.

Q. Where were the items that you appraised?

A. They were scattered from Frank Perez Brothers to Mr. Hines in Tamuning down to the sand yard at Tumon Beach.

Q. In appraising, what value did you fix on it, the market value or what?

A. Well, on most of the equipment, construction road equipment—I appraised that at the value that we would give. I say “we”—Koster and Whyte—the value it would have been worth to us.

Q. The value was what you would have purchased it for?

A. That is right.

Q. Now the items that Koster and Whyte were not willing to purchase, what value did you fix on them? What did you fix on the other items?

A. The other items what they were selling for around Guam.

Q. Those items it was the general market value?

A. On the surplus market.

Q. I show you a three-page document and ask you if you recognize it, a typewritten document?

A. This is the document that I made up in late '53 and I sent these copies out to, I think, four different persons.

Q. This represents your appraisal of the Island Service Company equipment that you testified to previously?

A. That is right. [139]

Mr. Turner: Your Honor, I would like to have this admitted in evidence without objection.

(Testimony of James Norris.)

The Court: Very well.

Mr. Turner: Plaintiff's Exhibit next in order. Would you kindly staple that last page to the front, please.

Q. (By Mr. Turner): Mr. Norris, while the clerk is marking the exhibit would you state how you customarily appraise a piece of heavy or light equipment or machinery? What inspection did you give it?

A. Well, it's all according to what it is. First, we always appraise by whether it is in running condition and what shape it is in, what condition it is in, then according to how badly it is worn and how rusty.

Q. Do I understand you first approach any piece of equipment to determine if it is in running condition?

A. That is right.

Q. And if it is not in running condition, it is what parts are missing and general overall condition?

A. That is right.

Q. How long did it take you to appraise this equipment?

A. I was about two days, a day and a half—one full Sunday and a part of another one.

Q. I hand you your appraisal sheets which have now been marked Plaintiff's Exhibit 9 and ask you what items on there you appraised as the amount that Koster and Whyte at that time [140] were prepared to pay for them?

A. The Northwest shovel 25.

(Testimony of James Norris.)

Q. How much did you appraise that for?

A. \$4,500.

Q. Next item?

A. The Adams road grader.

Q. How much did you appraise that?

A. \$3,200, and the road roller at \$3,500 and the TD18 bulldozer at \$4,200 and the International diesel truck, 600-gallon truck, at \$875, and the 3,900-gallon tanker at \$2,000.

Q. Do I understand Koster and Whyte were prepared to purchase that?

A. At that time they were and most of the miscellaneous shop equipment, the testing machines, valve reseating machines and quite a bit of the small tools.

Q. Mr. Norris, did you at any time offer to Mr. Hines or a representative of Island Service Company to purchase that equipment?

A. On the Sunday that we were estimating, appraising the equipment, one of Mr. Hines' representatives was with me at the time and I told him. Also they had a sandblasting machine in the back there. I told him that we could use the stuff and pay what I appraised it for, but I don't think I told it directly to Mr. Hines.

Q. What did the representative of Mr. Hines say? [141]

A. He said it could not be sold.

The Court: Who was that representative—Mr. Viray?

(Testimony of James Norris.)

A. Yes, sir, it was the Filipino accountant who formerly worked with Koster and Whyte.

Mr. Turner: Your witness.

Cross-Examination

By Mr. Crain:

Q. You mentioned the fact that some of this equipment was at Island Equipment Company? You meant to say Island Service Company?

A. Island Service Company.

Q. You mentioned Sullivan Motors in Kansas City. That is an automobile dealership?

A. No, it is not.

Q. What is their business?

A. Caterpillar tractors and all earth-moving equipment.

Q. When did you work for Sullivan Motors?

A. 1946 and '47, early part of '47.

Q. When did you come to Guam for Morris and Knudsen? A. November '47.

Q. How long were you with Morris Knudsen?

A. November '47 to April '49.

Q. And then where did you go?

A. I was purchasing for the Army Post Engineers, Marbo.

Q. What did you purchase? [142]

A. Equipment foreman and also done quite a bit of buying for them.

Q. What were you buying particularly?

A. Well, I was in charge. Then we had local

(Testimony of James Norris.)

purchase of most of all our spare parts for our equipment what we couldn't get on the base.

Q. Were you buying new or used equipment?

A. New and used both.

Q. This offer to purchase these certain items of equipment on the part of Koster and Whyte was never made by Koster and Whyte directly to Mr. Hines?

A. Well, I am authorized from Koster and Whyte to purchase anything I need.

Q. Well, no such offer was ever made by Koster and Whyte to Island Service Company?

A. After I took the appraisal of it and the boy told me it was not for sale it was never carried any further.

Q. You never asked Mr. Hines to confirm that statement in any way?

A. No, sir.

Q. Isn't it correct that when you made this appraisal of these particular items of equipment that you took approximately three to four weeks to compile your figures and submit your appraisal after you had actually looked at the equipment?

A. No, it wasn't that long. [143]

Q. How long was it?

A. Because I took—we started on one Sunday and we didn't get to see all of the equipment. There were two or three items I had to look at the following Sunday and then it was that week I got it typed up and submitted.

Q. Isn't it correct that you used an equipment

(Testimony of James Norris.)

manual from the States for part of the information that you felt you needed in order to reach figures that you have set down in your appraisal?

A. No, sir.

Q. You never did? A. No, sir.

Q. You testified on direct examination that prior to 1953 you had bought and sold a substantial amount of equipment on the island?

A. That is right.

Q. Can you give us a little more accurate idea of how much substantially that was?

A. I would say in the neighborhood of \$100,000.

Q. Was any of that for your own account or for employers?

A. That was for employers and some of it for my own account.

Q. What percentage?

A. I bought probably \$10,000 or \$12,000 for my own account and the rest for employers. [144]

Q. Was it mostly for Koster and Whyte?

A. Koster and Whyte and Vinnell.

Q. Did you work for Vinnell? A. I did.

Q. When?

A. 1950, '51 and part of '52, the fall of '50, '51 and up until January '52.

Q. Well, now, actually in purchasing for Koster and Whyte and Vinnell you were going out and buying specific items they needed on the market? You were not buying and appraising equipment in the open market?

A. Well, we bought and sold. Vinnell bought

(Testimony of James Norris.)

quite a bit of equipment here on the island. We were fixing it up and shipping it.

Q. Mr. Norris, were you given any instructions as to how you should perform this appraisal other than that you were told the location of the equipment, given a list of it and told to go appraise it?

A. I think Mr. Hines was there or one of his representatives was with me showing me the equipment.

Q. You never discussed with Mr. Lathrop his evaluation of the individual items of equipment?

A. I did not.

Q. Did you with Mr. Forkner?

A. No, sir. [145]

Q. Did you ever see, before you made your appraisal, the appraisals that had been made by Mr. Forkner or Mr. Lathrop?

A. I never saw them to date.

Q. In other words, in making your appraisal you did not try to adjust differences between those two appraisals? A. No, sir.

Mr. Crain: That is all.

Mr. Turner: Do you have any questions, your Honor?

The Court: No, thank you very much.

Mr. Turner: That is all I have except Mr. Wiseman.

The Court: Very well, we will recess until tomorrow morning.

(The court recessed at 4:30 p.m., October 24, 1955, and reconvened at 9:30 a.m., October 25, 1955.)

The Court: Just take the stand, Mr. Wiseman.

SHERWOOD WISEMAN

Direct Examination

The Court: You are through with Mr. Wiseman?

Mr. Turner: No, Mr. Crain had started to examine him on voir dire in connection with the balance sheet. It is my understanding you are willing to let the exhibit go in without objection? May I have the plaintiff's last exhibit? May the record show that Mr. Crain has returned the deposition of Mr. Lathrop to the court's files.

Mr. Crain: And the exhibit.

Q. (By Mr. Crain): Mr. Wiseman, referring to Plaintiff's [146] Exhibit 6 there is a difference on the reconciled cash on hand and in the bank—your Honor, I have had the reporter prepare an extra copy which may be of assistance to you—there is a difference between Mr. Viray's cash on hand and in bank and Mr. Kaneshiro's. Do you know what that difference consisted of?

A. No, I don't.

Q. All of the other items are in agreement down to buildings at value per agreement less reserve. You have \$21,616.59 for Viray and \$21,769.10 for Kaneshiro—a slight difference but do you know what that difference consists of?

A. Yes, I think that is involved in the reserve.

Q. It depends on the depreciation?

A. Yes.

(Testimony of Sherwood Wiseman.)

Q. In other words, Mr. Viray and Mr. Kaneshiro were unable to agree with you on a value for the fixed depreciation of the buildings?

A. Well, I wouldn't say that; I never tried to get them into agreement.

Q. But they were in agreement this figure for Viray on the buildings represents his agreed figure and the one for Kaneshiro represents his agreed figure?

A. Yes, I seem to recall that.

Q. And the same for cash on hand and in the bank. Now going down to heavy equipment, note 1. What is Note 1? Let me ask you this: Did you select that figure because it was [147] the third appraisal pursuant to the agreement?

A. No, my note No. 1, which is a very important part of the figures I come up with—in fact all of the notes I have bear a relationship to the qualifications, let us say, that I as an accountant made relative to the figures that are on this statement, and my note No. 1 says I have adjusted Mr. Viray's balance sheet equipment value to reflect the value shown by Mr. Kaneshiro's on the understanding that the amount of \$34,391 is the amount agreed upon as the appraised value of the equipment.

Q. I see. If there was any change in that heavy equipment upwards it would increase the surplus upward; it would increase the surplus by the amount of the change?

A. Any change in this figure would have to be adjusted on the two balance sheets.

(Testimony of Sherwood Wiseman.)

Q. But it would increase the surplus?

A. Yes.

Q. Now down on notes payable you have "See Note II." There is a difference there of \$13,659.15 on Mr. Viray's adjusted balance sheet and \$16,959.15 on Mr. Kaneshiro's balance sheet.

A. Well, Note II reads "A difference of \$3,300 is shown between Mr. Viray and Mr. Kaneshiro. I have not examined the note due Mr. Perez, although it would appear that Mr. Viray's figure is correct. In Mr. Turner's undated memorandum to Mr. [148] E. R. Crain relative to Island Service Company audit Mr. Turner notes and it is in quotes 'with reference to notes payable the amount payable to Mr. Perez should be \$13,659.15. It is requested that Mr. Viray recheck his figures on payments to Mr. Perez on his notes,' end of quote. Although it is noted that Mr. Viray shows an agreed amount of \$13,659.15 while Mr. Kaneshiro's audit shows the larger amount, a review of the notes in question would reveal the correct amount," and I think in my subsequent remarks in my original report under Note II, I made mention of a difference of \$3,300 between the notes payable of Mr. Kaneshiro and Mr. Viray. A recap of the two figures shows that Stanley Kaneshiro had \$16,959.15 and Viray a difference of \$3,300. A portion of this difference, \$3,000, is due to the treatment given a check in the amount of \$5,000 which was payable to Mr. Perez from the Treasury of the United States. This check represented a refund to Mr.

(Testimony of Sherwood Wiseman.)

Perez of the deposit he maintained with the federal government. Mr. Perez contended he gave this check to the Island Service Company, Inc., in payment of \$2,000 he owed the company and that he did not receive the remaining \$3,000. On this reasoning Mr. Kaneshiro set up an increase in notes payable to Mr. Perez. Accountant for Mr. Hines, Mr. Viray, says proper records are lacking to substantiate or refute the claim by Mr. Perez and it should not be set up until complete substantiation is forthcoming. I requested and received a photostatic copy [149] of the check. It was indorsed in blank by Mr. Perez, that is, Joaquin A. Perez. Directly beneath this indorsement appeared an additional indorsement, Island Service Company. In addition the document showed that it had been paid by the local branch of the Bank of America on March 11, 1951. I then requested the Bank of America to check the deposits made around that date by Island Service Company, Inc. The record showed that the check had been deposited to the credit of the account of Island Service Company on March 15, 1951, together with other checks. From the above it appears that Mr. Perez did give the check to Island Service Company and a receipt covering this money cannot be found nor can it be traced to any of the books of Island Service Company. It would be difficult to prove giving him full cash in the amount of \$5,000 or that the Island Service Company did not receive the check from Mr. Perez, deduct the \$2,000 owed

(Testimony of Sherwood Wiseman.)

by Mr. Perez and return \$3,000 in cash to him. In line with the above and due to the lack of further substantiation, it would appear that Mr. Kaneshiro did not possess the required substantiation. The remaining difference of \$300 cannot be traced by me. In other words, I did not make any adjustments on the books for that figure, but my comments are a very very important part of what figures I have on this comparative balance sheet.

Q. I see. This comparative balance sheet then, with those notes, constitutes your reconciliation of the two audits [150] and do I understand that this comparative balance sheet sets forth, except for those differences, adjustments in each of the auditor's balance sheets that they accepted?

A. Yes.

Q. Mr. Wiseman, in your reconciliation did you use standard accounting methods?

A. Yes, I did.

Q. Do you possess a copy of the Standard Accountant's Handbook? A. Yes, I do.

Q. Would you say that your reconciliation was in accordance with the standards set up in that accounting handbook?

A. To a point it was, yes.

Q. When does an accountant refer to the Standard Accountant's Handbook?

A. Well, basically an accountant refers to that on items that he may be a little rusty on and for proper forms that he may want to use.

Q. I see. Did you feel it was necessary in this

(Testimony of Sherwood Wiseman.)

type of reconciliation to refer to the Accountant's Handbook at any time? A. No.

Q. So you do feel that there were standard accounting methods used in this reconciliation?

A. There again up to a point. [151]

Q. What do you mean?

A. Let's say if I were auditing the books of Island Service Company I would have gone into it much more fully.

Q. But in your reconciliation you applied standard accounting principles? A. Yes, I did.

Mr. Turner: That is all.

Cross-Examination

By Mr. Crain:

Q. Is it substantially correct, Mr. Wiseman, that the comparative balance sheet that you prepared here was not intended to be an actual final statement of the condition of Island Service Company as of the 30th of September, 1952, but rather that this comparative balance sheet has to be taken in consideration with all of your notes and comments that are attached to it and that pertain to it?

A. Yes, that is right.

Q. In other words, this balance sheet is for all practical purposes an educated guess as to what these accountants were trying to arrive at in this supposedly joint audit that they conducted?

A. Can I ask you a question? An educated guess by whom?

Q. By you.

(Testimony of Sherwood Wiseman.)

A. Not, it's not that. All I did was to take respective balance sheets given to me by the two gentlemen and try to tie [152] in the two sets of sets of figures by having discussions with them and applying standard accounting principles where they didn't.

Q. Where they did not? A. Yes.

Q. Or where you couldn't determine that they had by cursory examination? A. Yes.

Q. Is it correct that you used Mr. Kaneshiro's balance sheet as a basis for your examination of both of these because of the fact that he had been the bookkeeper for Island Service Company and that you went on the assumption that he should have had the most thorough knowledge of the condition of the company's books?

A. Yes, I think you could say that.

Q. In other words, you used Kaneshiro's balance sheet as the fulcrum for making your adjustments back and forth in both it and Viray's?

A. Well, let me say it this way—let me say I adjusted Mr. Viray's balance sheet much more than I did Mr. Kaneshiro's balance sheet.

Q. Did you ever see the working papers or other substantiating data that Kaneshiro used in arriving at the figures contained in his balance sheet?

A. No. [153]

Q. Am I correct that the figure of \$34,391 used by you in your comparative balance sheet as the value of the heavy equipment at its appraised value was arbitrarily taken by you from Mr. Kaneshiro's

(Testimony of Sherwood Wiseman.)

balance sheet? A. Yes, that is right.

Q. But in your note you indicated that the final acceptable appraised value would vary the final figures of the balance sheet as to whether it went up or down? A. Yes.

Q. Now on your comparative balance sheet you have one other item here—the reserve for income taxes in the amount of \$10,903.79. Was that set up by you as the result of an assessment of deficiency by the Government of Guam against Island Service Company for income taxes for 1951 and 1952? A. Yes.

Q. And that item is actually a liability of the corporation and not to be considered a part of its surplus?

A. Well, it's a liability until the deficiency is abated by the Government of Guam.

Q. But in determining the value of the corporation that item should be deducted from the surplus rather than added to it, should it not, in determining the net value of the corporation?

The Court: It has been deducted, hasn't it?

Mr. Crain: It is included in there and it does not appear [154] in Mr. Kaneshiro's balance sheet.

A. I show it as a reserve.

Q. (By Mr. Crain): Going back to the accounts receivable, Mr. Wiseman, you testified yesterday that you had finally set up a reserve in the amount of \$16,473.24 as against a total of accounts receivable in excess of \$70,000, is that correct?

A. Yes.

(Testimony of Sherwood Wiseman.)

Q. Did you ever examine the entire list of accounts receivable of Island Service Company?

A. Well, I was shown the detail list, but I never checked them back to the books.

Q. By whom were you shown the detail list?

A. Mr. Viray.

Q. You never examined those accounts receivable for quality, did you? A. No.

Q. You never discussed those accounts with anyone other than the two accountants?

A. That is right.

Q. Not with the management of Island Service Company to determine the amount of work that had been done in an attempt to collect the outstanding accounts? A. No.

Q. Taking you as an accountant, Mr. Wiseman, who has been qualified as an expert here and taking the hypothetical [155] situation that an examination of these accounts and a discussion of them with the management of the company would have substantially satisfied you that major attempts had been made to collect these accounts, that each debtor had been contacted and demand had been made, and that it had been determined that some of these debtors no longer were in Guam, the others had no assets, that still others claimed that they had made payment to an officer of the company—in a situation like that would you feel that the reserve for bad accounts receivable could conceivably be raised to a higher figure than the one that you set up?

(Testimony of Sherwood Wiseman.)

Mr. Turner: I object to this, your Honor, on the grounds that there has been no evidence introduced in this court to which this hypothetical question could have any relevancy.

The Court: Objection sustained. A hypothetical question must be based on facts in evidence or testimony in evidence. Mr. Viray's testimony was not that demands were made but that letters were sent out asking people if they acknowledged the debt.

Mr. Crain: On cross-examination Mr. Viray testified that every one of these people had been contacted personally.

The Court: He said "no." The question you asked him was whether the letters had been hand-delivered.

Mr. Crain: Mr. Viray read into the record the fact from his own notes and comments that each debtor had been personally [156] contacted.

Mr. Turner: Your Honor, that is directly contrary to the schedule. He listed specifically each debtor he had the letter sent out to but no answer.

The Court: The question was asked Mr. Viray as to whether these letters had been delivered by hand and he responded that they had. He testified, as your question states, that in some instances the debtors had left the island and there was some confusion as to the payment to an officer of the company. He testified at one time that he could only remember one person then inferred that there were others, but his own compilation shows that the letters he sent out were not demand letters but just

(Testimony of Sherwood Wiseman.)

to acknowledge the indebtedness as shown on the books and that was his testimony.

Q. (By Mr. Crain): When we were previously discussing the Standard Accountant's Handbook, Mr. Wiseman, am I correct in my understanding that standard accounting procedures and general instructions in that handbook called for conservatism in the handling of the matter of old accounts receivable and that the handbook would give the accountant considerable leeway in applying a conservative program to setting up what he would consider to be an adequate reserve for those bad debts?

A. Yes, that is right.

Q. And taking that into consideration and taking into consideration the fact that Mr. Viray is the accountant for [157] Island Service Company as well as auditor of the audit that is now in question, would it not be just as reasonable that his reserve of \$36,000 would be as conservative as your reserve of \$16,000 which was not tied into any knowledge of the quality of these accounts?

Mr. Turner: That is contrary to Mr. Viray's testimony. He testified that he wrote off \$36,000. It is a great deal different than setting up a reserve of \$36,000.

Mr. Crain: I will qualify my question.

Q. (By Mr. Crain): His writing off of \$36,000 accounts receivable as bad debts would be just as reasonable, within the limits of conservatism advocated by the Accountant's handbook, as the setting up of a reserve of \$16,000?

(Testimony of Sherwood Wiseman.)

A. Well, theoretically he shouldn't write them off. He should provide a reserve and then after considerable work had been done on the accounts and after it is finally determined that the account is uncollectible then he could write off his account against the reserve.

Q. Well, you said theoretically he shouldn't have done it one way; he should have done it the other. Wouldn't the practical application be much the same whether he would write them off or set them up as a reserve?

A. No, it is not exactly the same. Once you write off an account then it is pretty well forgotten but when you set up a reserve against it you still have the account open as being due. [158]

Q. Merely because you write it off doesn't mean you cease attempts to collect it, does it?

A. No, but it is a pretty good indication that you have pretty well forgotten it.

The Court: If you write it off it never again shows up in your accounts as an asset.

Mr. Crain: It would if you would pick it up—if you collect it.

A. No, it would be income.

Q. (By Mr. Crain): For the same practical purpose though—

A. From an accountant's angle I don't think he would be justified in writing off the accounts because when you write off an account or set up a reserve for an account you do it when the account

(Testimony of Sherwood Wiseman.)

has actually become bad not when you think they are bad. There could be quite a difference.

Q. In the final analysis who determines whether they are bad or whether they are thought to be bad?

A. Well, it's up to the company to prove that an account became bad at an exact time rather than at a subsequent or prior time.

Q. But the accountant who was handling the books would in all probability be the best person to determine that, would he not?

A. Well, that is a tough one to answer.

Q. Let's take Jones and Guerrero. Who in the final [159] analysis there determines when an account becomes bad?

A. Well, either myself or Mr. Jones.

Q. You are the chief accountant, aren't you?

A. Yes.

Q. Actually, Mr. Wiseman, as among accountants each man has his own method of conducting his business? Two accountants with two identical sets of books do not often approach their problems in the same fashion, do they?

A. That is right.

Q. So that even though personally and from your training you disagree with Mr. Viray in writing off \$36,000 as bad accounts, he was still proceeding reasonably within what would be his prerogative as accountant for this company, would he not?

A. Basically, yes.

Mr. Crain: I have no other questions.

(Testimony of Sherwood Wiseman.)

Redirect Examination

By Mr. Turner:

Q. Mr. Wiseman, where a corporation was formed in November of 1950——

Mr. Crain: Excuse me—'49.

Q. (By Mr. Turner): '49, all right, and it had accounts upon its books for tax purposes would it be able to write those accounts off as of September 30, 1952? A. I don't think so.

Q. In other words, even the statute of limitations hasn't [160] passed——

Mr. Crain: I object to that. That is calling for a legal conclusion on the part of the witness.

Mr. Turner: All right then I will just withdraw that question.

Q. (By Mr. Turner): Isn't it true that the tax regulations do not permit the writing off of an account under all circumstances even when the statute of limitations has passed?

A. Well, upon the passing of the statute of limitations I think a man would be more able to prove the write-off of the account to the commissioner than any other way. I think that would be a very good way or basis to show the commissioner that you have written off an account because of such and such.

Q. Mr. Viray testified on cross-examination that he had written off \$36,000 of these accounts receiv-

(Testimony of Sherwood Wiseman.)

has actually become bad not when you think they are bad. There could be quite a difference.

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Q. Mr. Viray testified on cross-examination that he had written off \$36,000 of these accounts receiv-

(Testimony of Sherwood Wiseman.)

able as bad debts on instructions of Mr. Hines and that he considered it bad accounting practice. Would you agree with that statement of Mr. Viray?

A. Would you repeat that please?

A. Mr. Viray testified on cross-examination that he had written off some \$36,000——

Mr. Crain: If the court please, Mr. Viray testified on direct examination, not cross-examination.

Q. (By Mr. Turner): Well, make it direct—that he had written off some \$36,000 of accounts receivable on his second [161] balance sheet on instructions of Mr. Hines and that he, Mr. Viray, considered that to be bad accounting practice. Would you agree with that statement?

A. That Viray considered it to be bad?

Q. To write off that \$36,000 accounts receivable as bad debts.

A. Well, specifically why was he instructed to do it?

Q. He just said he was instructed. He did that on the second balance sheet but that he, Viray, considered that to be bad accounting practice. Would you agree that it was bad accounting practice?

A. Well, let me say it this way—if Mr. Hines wanted Mr. Viray to do something and Viray is working for Hines, I am reluctant to think that Viray would have any other alternative but to write them off.

Q. No, I am asking you if it would be bad ac-

(Testimony of Sherwood Wiseman.)

counting practice? A. To write them off?

Q. Yes.

A. I can't answer that question. I can answer it with all kinds of qualifications.

Q. Would you consider it to be unusual for a corporation to carry on its books from November of 1949 until 1955 the accounts receivable with a reserve set up for bad debts and then for one single balance sheet not use the reserve method [162] but write off bad debts?

A. You can't do it; if you are working with a reserve method of accounts receivable then you have to follow through that way.

Q. In other words, if the corporate practice was to use the reserve method then it would have to be in all balance sheets?

A. Yes and for tax purposes also.

Q. It would be inconceivable that a company would carry its accounts receivable on its books one way and then have them another way for tax purposes? A. It would be odd.

Q. Then another point I asked you before but I want to reask you—this balance sheet represents your reconciliation as best as possible of the differences between the two accountants except for items which are not the same, the two or three accompanied by your notes and the two accountants agreed to that reconciliation?

A. Um huh, but not to the best possible.

(Testimony of Sherwood Wiseman.)

Q. I mean not all the way through but on the adjustments they were made? They have already testified.

A. In other words, Mr. Turner, I did not look at any set of books that Hines or Island Service Company had. When I went into this contract that was one of the stipulations, that I wouldn't. [163]

Q. That you would attempt to reconcile the differences?

A. That I wouldn't get involved insofar as an audit.

Q. You were to reconcile the differences as far as possible?

A. As far as possible.

Q. And this Plaintiff's Exhibit 6 represents the reconciliation and the accountants agreed with that reconciliation?

A. Yes.

Mr. Turner: That is all.

Recross-Examination

By Mr. Crain:

Q. I will try to clarify this one item. This comparative balance sheet, Plaintiff's Exhibit 6, is not complete on its face unless your notes and comments are attached, is that correct?

A. That is right.

Mr. Turner: Do you have any questions, your honor?

(Testimony of Sherwood Wiseman.)

Examination by the Court

Q. As I understand it, Mr. Wiseman—I want to go over these item by item—in your conference with the two accountants they agreed on the current assets within \$150? A. Yes, sir.

Q. And they agreed on the fixed assets within 3 or \$400?

A. No, sir, there was still something to be done on the fixed assets and that was the appraisal. [164]

Mr. Crain: Not fixed assets. That is the heavy equipment.

Mr. Turner: Mr. Wiseman means that the heavy equipment is in the fixed assets.

Q. (By the Court): That is right and that was in dispute and could not be reconciled?

A. Yes, sir.

Q. But the value of the buildings was agreed to within roughly \$150? A. Yes, sir.

Q. And the office equipment was agreed to within roughly \$30? A. Yes, sir.

Q. And the furniture and fixtures agreed to within roughly \$150? A. Yes, sir.

Q. The heavy equipment is in dispute?

A. Yes, sir.

Q. The merchandise in transit—they were practically in agreement on that? A. Yes.

Q. And in entire agreement on the prepaid insurance, prepaid expense and the deposits?

A. Yes, sir.

(Testimony of Sherwood Wiseman.)

Q. The note payable under Note II does that discrepancy [165] largely represent the dispute over the Perez obligation? A. Yes, sir.

Q. In other words, Perez holds a note from the corporation?

A. It was set up in the notes payable account.

Q. He does have a note, does he?

A. The books do not show it one way or the other. Mr. Kaneshiro's balance sheet showed it as notes payable but I didn't see the note itself.

Q. And there is some question as to whether it was properly set up on the books as a note payable?

A. Yes, sir.

Mr. Turner: If I might ask a question. It is my understanding there isn't any argument on the books on account of the notes of \$16,000. There is an account on the books for that account? In other words, they are in agreement to the extent of the \$16,000? A. Yes, sir.

Q. (By the court): And the drafts payable were reconciled within roughly \$400?

A. Yes, sir.

Q. The accounts payable—they are in agreement? A. Yes, sir.

Q. And the accrued items—they are in agreement? A. Yes, sir.

Q. Now, let me ask you, Mr. Wiseman, as chief accountant [166] of a large firm do you have any opinion as to what credit losses should amount to, percentagewise, for the years '50, '51 and '52? In other words, if you extended \$10,000 worth of credit

(Testimony of Sherwood Wiseman.)

how much of a loss, percentagewise, would you expect?

A. Well, your honor, that is based on how rigid a collection program you have. If your collection program is at your fingertips and is under control all the time, your losses would be, I would say, less than five percent.

Q. Primarily it would be based on what credit risks you accepted?

A. Yes, sir. If you just arbitrarily give credit to every Tom, Dick and Harry that comes along you are going to have quite a bad debt loss.

Q. Well, would it be correct to say of a properly managed business that your credit losses should not exceed two or three per cent a year?

A. I would say that would be very close.

Q. And has that been your experience in Guam?

A. No, sir it hasn't.

Q. Your credit losses have been higher?

A. Much higher. Can I state a specific example?

Q. Yes.

A. I am connected with a very large company here other than Jones and Guerrero and their credit losses are terrific or they had been until the credit program was tightened up and [167] after they began to issue credit to only those houses of business on the island that warranted credit then the credit losses went way down to a very small amount. Prior to that they were giving credit to most anybody who came along. Whether he had a business or

(Testimony of Sherwood Wiseman.)

didn't—it seemed to make no difference as long as he sold the merchandise.

Q. Now, Mr. Wiseman, during the period which we are dealing with here we had no central source to obtain credit information? A. No, sir.

Q. Do we have any yet?

A. Well, this way you do—if a man is bad on the island now, it's pretty common knowledge—no central clearing agency or anything like that.

Q. That of necessity meant that during this period in question the individual businessman had to exercise his own individual judgment?

A. Yes, sir.

Q. As to whom he would extend credit to, but you feel that your reserve here is reasonably adequate in the light of this particular type of business?

A. My reserve that I set up was better than the reserve that they had on the books. The reserve they had was very very small.

Q. Yours was approximately \$13,000 [168] more?

A. Yes, sir.

Q. You set up the reserve or increased the reserve without going to the accounts or without talking to the management or without getting an idea of their prior credit history?

A. If I was to make an audit of the Island Service Company as an independent accountant, I would have gone much, much deeper, not only into the accounts receivable but all the other assets be-

(Testimony of Sherwood Wiseman.)

fore I would have put out a statement of any kind.

Q. If you were examining a statement and found an item in excess of \$4,000 alleged to be owing to the corporation by Corn and Murray written off as a bad debt, would you not have questioned that? A. Yes, sir.

The Court: I have nothing else.

Mr. Crain: (Shakes head).

Mr. Turner: The plaintiff rests.

Mr. Crain: If the Court please, the defendant at this time would move the Court to dismiss the complaint. The complaint is allegedly based upon an agreement entered into between the parties on the 29th day of September, 1952. This agreement calls for certain things to be done and for certain things to be determined prior to the time that a suit might be filed. The evidence that has been presented here has been that an audit took place not pursuant to the terms of this agreement, but that two persons appointed by the two parties to this [169] action prepared two separate audits. Mr. Kaneshiro, the auditor for Mr. Perez, the plaintiff, testified that as far as he knew this audit was still going on and had not come to a conclusion. In addition to the fact that the audit was not conducted in accordance with the terms of the agreement we have the matter of appraisal of the heavy equipment. The agreement sets out a specific manner in which the appraisals shall be made.

The Court: It provides for two appraisers and the selection of a third, doesn't it?

Mr. Crain: It provides for two appraisers and the selection of a third. It further provides that if the two appraisers are unable to agree upon the value of any asset as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final. There is no evidence here that either one of the appraisers—in fact there is testimony to the effect that they never appraised this equipment together, that they never discussed their appraisals and that they merely submitted a separate list of items. I think the Court has also noticed that although substantially they appraised the same list of equipment that there are different omissions in each of the appraisals that have so far been presented to the Court so that none of these appraisals so far before the Court are even reasonably accurate.

The Court: Well, what remedy do you think Mr. Perez is [170] entitled to? You have his stock; you took over the business according to testimony as of October 1, 1952, and ran it to his exclusion.

Mr. Crain: I don't think it was run to his exclusion. He was drawing a salary for two long years for doing nothing.

The Court: Well, as of that date Mr. Hines took over everything and directed the policies and operation and everything else.

Mr. Crain: There has been no testimony——

The Court: In other words, did not Mr. Perez comply with his agreement subject to the conditions subsequent when he turned over his stock to Mr. Hines and the position of the parties was changed

according to the testimony before me. What was Mr. Perez supposed to do? You drew up a complicated formula; it was drawn up by counsel; these parties always had the advice and assistance of counsel. The formula provided that you have two accountants and their determinations would be subject to reconciliation by a third who was not required to make a thorough audit but to reconcile the differences. With the exception of two or three items he succeeded in reconciling those differences. And the agreement further provides that if there is any discrepancy, counsel shall attempt to reconcile the further discrepancies. Counsel had more than adequate time to do that; presumably they were unable to do it.

Mr. Crain: I don't see how the Court can presume when [171] there is no testimony whether they did or not.

The Court: The Court can because we had the pretrial conference in an attempt to reconcile any differences, as it always does, to see if the parties can get together without trial, and it was stipulated that the entire contract was in dispute.

Mr. Crain: The agreement calls for that dispute to have arisen before the filing of an action, not in the judge's chambers at a pretrial conference after the suit had been on file for a number of months.

The Court: It is not at all uncommon that counsel can reconcile their differences after an action has been begun. The motion will be denied.

Mr. Crain: Shall we have a recess before proceeding?

The Court: Yes, we will take a ten-minute recess.

(The Court recessed at 10:30 a.m., October 25, 1955, and reconvened at 10:40 a.m., October 25, 1955.)

The Court: The defense may proceed.

Mr. Crain: With Mr. Turner's stipulation I would like to be the first witness for the defense in order to lay a foundation for Mr. Lathrop's deposition.

Mr. Turner: With reference to the total of the appraisal submitted, it is stipulated between counsel for the plaintiff and defendant that the total amount of Mr. Forkner's appraisal was \$22,349. [172]

The Court: Mr. Lathrop's \$41,036; Mr. Norris' \$34,391?

Mr. Turner: So stipulated.

Mr. Crain: Right.

MR. E. R. CRAIN

counsel for defendant, was duly sworn and testified as follows:

Direct Examination

The Court: Do you want to proceed in a narrative style, subject to objection?

Mr. Crain: Would you permit that?

Mr. Turner: Yes.

Mr. Crain: My name is E. R. Crain. I am an

(Testimony of E. R. Crain.)

attorney at law, licensed to practice in the Territory of Guam and I am counsel for the defendant in this case. Prior to the summer of 1953, two appraisals of heavy equipment and warehoused items of material and equipment had been made by a Mr. Walter Lathrop and a Mr. Spencer M. Forkner, Mr. Lathrop making his appraisal for the plaintiff, Mr. Perez; Mr. Forkner making his appraisal for the defendant, Mr. Hines. Those appraisals had been made late in 1952. The agreement that is in dispute here called for the two appraisers selected by the parties to select a third appraiser to reconcile the differences. Up to the summer of 1953 no such third appraiser had been selected and no third appraisal had been made. During that period of time from October, 1952, to the summer of 1953 there had been a number of discussions between myself and Mr. Turner, counsel for the [173] plaintiff, which had taken place either in Mr. Turner's office or my office or by telephone at such times as Mr. Turner happened to be in Guam. Some of these discussions in the spring and summer of 1953 pertained to the necessity of securing a third appraiser. It was not possible for me, as counsel for the defendant, to go directly to Mr. Walter Lathrop and demand that he join with Mr. Forkner in the selection of a third appraiser. I discussed the matter with Mr. Forkner, hoping that he could get Mr. Lathrop to agree upon a third appraiser, but it is my recollection that during much of that time Mr. Lathrop also was not in Guam. Due to this

(Testimony of E. R. Crain.)

set of circumstances, at a time when Mr. Turner was in Guam in the summer of 1953, I suggested to Mr. Turner, both by telephone and in discussions in his office, that in order to expedite bringing this case to a conclusion that we select a third appraiser. Our discussion went to who was available in Guam that would be competent to be a third appraiser, a man who had experience with heavy equipment and surplus equipment, such as was being appraised here. I suggested Mr. Henry Schwendinger, an employee of the Ellis Company, who had been in Guam many times since approximately 1948 purchasing and shipping surplus military equipment. Mr. Schwendinger was known to Mr. Turner and upon checking it was found that Mr. Schwendinger was on Saipan and came in to Guam at fairly frequent intervals. Mr. Turner and I agreed that at such time as Mr. Schwendinger [174] should come in to Guam it would be permissible for him to make the third appraisal, and on the next date that Mr. Schwendinger was in Guam I asked him if he would perform this service for us. He stated that he would and I gave him a list of the equipment on which blanks were left opposite the individual items, and in the fall of 1953, Mr. Schwendinger made an appraisal and submitted it to my office. When Mr. Turner next returned to the island I discussed this matter in his office, gave him the appraisal that Mr. Schwendinger had made and it was my understanding that he was going to have the appraisal copied and returned to me. Mr. Schwen-

(Testimony of E. R. Crain.)

dinger's appraisal was subsequently returned to me by Mr. Turner a number of weeks later with the information that Mr. Schwendinger's appraisal was unacceptable to his client, Mr. Perez; that Mr. Perez refused to accept the appraisal on the basis that Mr. Schwendinger had not been chosen by the first two appraisers in accordance with the terms of the agreement. Subsequently, without any discussion with me, a fourth appraiser, Mr. Norris, was selected and a fourth appraisal was submitted. As a result of the appraisal made by Mr. Schwendinger and pursuant to a notice of taking his deposition, filed with the Court and served in accordance with the rules, Mr. Schwendinger's deposition was taken and his original appraisal made an exhibit in that deposition and that deposition now is in the file of the Court unopened.

Mr. Turner: Just a minute. [175]

Cross-Examination

By Mr. Turner:

Q. You stated that Mr. Schwendinger's appraisal was made in the fall of '53?

A. That is my recollection.

Q. And that it was not until you presented the appraisal to me that I told you it was unacceptable—as a matter of fact a couple of days thereafter?

A. No, a matter of a couple of weeks thereafter.

Q. I returned the appraisal to you and said it was unacceptable on the basis it was not acceptable to Mr. Perez?

(Testimony of E. R. Crain.)

A. Because Mr. Schwendinger had not been chosen in accordance with the agreement.

Q. I show you a letter of yours and ask you if you recognize it?

A. It would appear that I am several months off in my——

The Court: The question is do you recognize the letter?

A. Yes.

Q. (By Mr. Turner): You wrote that?

A. I did, yes.

Q. And sent it to me? A. Um huh.

Mr. Turner: If there is no objection I would like to have this introduced as Plaintiff's Exhibit next in order.

Q. (By Mr. Turner): You are quite clear in your statement [176] and understanding that it wasn't until that appraisal was returned to you by me several weeks after that you were told Mr. Schwendinger wasn't acceptable?

A. That is my recollection.

Mr. Turner: Show the letter to the Court—Plaintiff's next exhibit.

Q. (By Mr. Turner): Well, then according to that letter you knew on the 21st of June that Mr. Schwendinger was unacceptable to Mr. Perez——

A. That was after his appraisal had been made.

Q. Now, wait. From your correspondence you knew on the 21st of June—— A. 1953.

Q. 1953, that Mr. Schwendinger was unaccept-

(Testimony of E. R. Crain.)

able to Mr. Perez because he was not selected in accordance with the contract, isn't that correct?

A. Right.

Q. And that was several weeks after I had had the appraisal returned to you with the information that he was not acceptable?

A. Right. I would like to correct my testimony. I was confusing the date of Mr. Schwendinger's appraisal with the date of Mr. Norris' appraisal. Mr. Schwendinger's was made in May. Mr. Norris' was made in the fall, about four or five months later.

Q. Just one more question to clear the record. Mr. [177] Forkner did the appraisal under the contract for Mr. Sgro because Mr. Sgro refused to do it?

A. He didn't do it for Mr. Sgro; he did it for Mr. Hines.

Q. I mean Mr. Sgro refused to do the appraisal for Mr. Hines?

A. That is right; he refused to do the appraisal.

Mr. Turner: That is all.

The Court: Just one question.

Examination by the Court

Q. You made reference to Mr. Turner's being off the island. Doesn't Mr. Turner reside in Guam?

A. Well, he resides in Guam but he was not here for a considerable length of time. I think he remembers that, too.

(Testimony of E. R. Crain.)

Mr. Turner: May the clerk open the deposition for the sole purpose of reading the date in Mr. Schwendinger's—

The Court: The deposition hasn't been offered yet.

Mr. Turner: I merely ask, if counsel is willing to stipulate, to having the deposition opened for the purpose of reading the date on the appraisal there.

The Court: We will stipulate as to the date then.

Mr. Crain: I am forced to stipulate that the date is June 22, 1953.

Mr. Turner: On this primary point, your Honor, I will take the stand.

The Court: Just a moment here. [178]

Mr. Crain: Are you my witness?

The Court: This isn't a witness controversy between counsel.

Mr. Turner: I merely wanted to get the deposition—

The Court: The defendant is putting on his case. If you want to testify you will have to testify in rebuttal.

Mr. Turner: You are offering the deposition?

Mr. Crain: Yes.

Mr. Turner: And I am putting on the rebuttal in connection with the admission of it, your Honor.

The Court: Well, now, Mr. Crain's testimony is, whether it is disputed or not, that there was an agreement between counsel that Mr. Schwendinger

(Testimony of E. R. Crain.)

should act as the third appraiser and that he did make an appraisal and that subsequently the plaintiff refused to accept that appraisal upon the ground that it was not made in accordance with the contract. Now in the interest of orderly procedure the Court has to take the testimony as part of the defendant's case. Now as I understand it, you are offering the deposition?

Mr. Crain: I am offering the deposition.

The Court: Now is there any objection to the deposition upon the ground that it was not regularly taken?

Mr. Turner: It was taken on notice, your Honor, no question about that, but my objection goes to its admissibility as to its relevancy to this case under the issues, and that is [179] why I want to put on rebuttal testimony.

The Court: That is not before me at this time. You can subsequently, of course, show in rebuttal that the deposition should not be considered by the Court for any purpose.

Mr. Turner: Well, I would normally think, your Honor——

The Court: But where you have a deposition taken on notice and you have a foundation laid that the appraisal was made pursuant to the agreement of counsel, the Court has no alternative except to receive that deposition for what it is worth.

Mr. Turner: The only question is whether I put mine in on rebuttal or right at this moment for the Court to determine whether it is admissible or not.

(Testimony of E. R. Crain.)

The Court: But that isn't before me at the present time. As long as I have a foundation laid——

Mr. Turner: In other words, you want my rebuttal put on at the close of defendant's case?

The Court: Yes, it has nothing to do, in other words, with the introduction of the deposition. The record will show that counsel have stipulated that the deposition was regularly taken but the plaintiff reserves the right to——

Mr. Turner: Right to object.

The Court: The right to object to its relevancy.

Mr. Turner: You want to take a short recess?

The Court: Well, counsel can step out if they wish. I will just read this. It is further stipulated, of course, that [180] the deposition may be inserted in the transcript without the necessity for having it read into the transcript. Very well, you may proceed.

Mr. Crain: Mr. Hines, will you take the stand, please.

CRISTOBAL C. HINES

defendant, called as a witness in his own behalf,
was duly sworn and testified as follows:

Direct Examination

By Mr. Crain:

Q. Will you state your name, please?

A. Cristobal C. Hines.

Q. Where do you live, Mr. Hines?

A. Tamuning.

(Testimony of Cristobal C. Hines.)

Q. Are you a stockholder in Island Service Company, Inc.? A. I do.

Q. Did you have in your employ, both individually and for Island Service Company, Inc., an accountant by the name of Ireneo Viray?

A. Yes, sir.

The Court: I would like to have this cleared up. Mr. Hines says he is a stockholder. Ordinarily a stockholder doesn't employ people.

Q. (By Mr. Crain): At the present time, Mr. Hines, you not only are a stockholder you are the major stockholder and an officer in Island Service Company, Inc., is that correct? [181]

A. Yes, sir.

The Court: What were you on September 30, 1952?

A. President of the corporation.

Q. (By Mr. Crain): Prior to September 30 what was your position?

A. I was a stockholder prior to September 30.

The Court: Were you an officer in the corporation?

A. After September 30th.

The Court: Didn't you have stock prior to that time?

A. I did.

The Court: Were you an officer then or just a stockholder?

A. To my memory I was a vice president.

The Court: Who managed the company?

A. Mr. Joaquin A. Perez.

(Testimony of Cristobal C. Hines.)

The Court: Did you work in the company at all?

A. No, your Honor.

The Court: In other words, you were vice president and a stockholder but you had nothing to do with the management?

A. No, your Honor.

Q. (By Mr. Crain): At any time, Mr. Hines, during the conduct of the audit of the books of Island Service Company, Inc., that has been testified hereto by Mr. Viray and others, did you instruct Mr. Viray to write off approximately \$36,000 of accounts receivable from the books of the company? [182]

A. No, sir.

Mr. Crain: I have no other questions.

Cross-Examination

By Mr. Turner:

Q. Mr. Hines, isn't it true that after September 30, 1952, you owned all of the shares of stock of Island Service Company, Inc., except the qualifying shares held by the other members of the board of directors?

A. I beg your pardon? Will you repeat?

Q. Since September 30, 1952, have you not owned all of the shares of stock of Island Service Company, Inc., except the three qualifying shares of the other members of the board of directors?

A. To be truthful, I own 72 per cent of the stock.

Q. Did you not after Mr. Joaquin A. Perez con-

(Testimony of Cristobal C. Hines.)

veyed his shares to you, his 25 shares on September 30, 1952, own all of the stock of the corporation?

Mr. Crain: I believe that is 15 shares.

Mr. Turner: 25.

Mr. Crain: 25 or 25 per cent?

A. Would you repeat please?

Q. (By Mr. Turner): At one time, that is on September 30, 1952, right after Mr. Joaquin A. Perez sold his shares to you and conveyed them to you did you not own all of the stock of the corporation? [183]

A. No, sir, not all.

Q. Who else owned some?

A. Some shares goes to Mr. Tomas Flores.

Q. How many shares did he have?

A. I think one share.

Q. One to Finton J. Phelan?

A. Mr. Phelan.

Q. And one to Mr. Arturo Hines and you owned all the rest at that time?

A. Yes, sir.

Q. And Mr. Joaquin A. Perez, pursuant to the agreement of September 29—

The Court: Now do I understand that prior to this agreement, Mr. Hines owned 77 per cent of the stock?

Q. (By Mr. Turner): Well, it is my understanding—you correct me if I am wrong—that at the time you bought Mr. Perez' shares, Mr. Joaquin A. Perez', you owned all of the stock, didn't you, except for the one share that Mr. Phelan had and the one share Mr. Tomas Flores had?

(Testimony of Cristobal C. Hines.)

A. And one share to Arturo Hines.

Q. Isn't it true from September, 1951, to September 30, 1952, you were acting treasurer of the corporation and received a salary of \$300 a month for your services? A. What is that?

Q. Isn't it true that from November, 1951, until September [184] 30, 1952, you were acting treasurer of the corporation, Island Service Company?

A. Yes, sir.

Q. And correcting my previous question—you received a salary of \$350 a month for that position, didn't you? A. I think so, yes.

Q. You signed checks of the corporation?

A. Countersigned.

Q. Who?

The Court: Who signed the checks?

A. Mr. Joaquin A. Perez and myself.

Q. Then you countersigned? A. Yes, sir.

Mr. Turner: I think that is all the questions I have.

Redirect Examination

By Mr. Crain:

Q. During that same period of time, November, 1951, to September, 1952, although you held the position of acting treasurer you still did not take any active part in the management of the Island Service Company, Inc., did you? A. No, sir.

Q. Is it correct, Mr. Hines, that shortly before September 30 or September 29, 1952, that as a result of the confusion in the management of Island

(Testimony of Cristobal C. Hines.)

Service Company, Inc., you bought out two other major stockholders? [185]

A. To be correct, three.

The Court: When was this?

Mr. Crain: Shortly before September 29, 1952.

Q. (By Mr. Crain): And prior to the time you bought them out what was your percentage of share interest in the corporation, if you recall?

A. I can't recall.

Q. Did you own over half of the stock before you bought those other three stockholders out?

A. No.

Q. It was less than half?

A. No, I only owned 15 shares before I bought the other three.

Mr. Crain: That is all.

Examination by the Court

Q. 50 shares is exactly half, isn't it?

A. 15, your Honor.

Q. 15? A. Yes, your Honor.

Recross-Examination

By Mr. Turner:

Q. Just one question. After October 1, 1952, you have been in active charge of the corporation?

A. Yes, sir.

Mr. Turner: That is all. [186]

Mr. Crain: That is all.

(Testimony of Cristobal C. Hines.)

Examination by the Court

Q. Mr. Hines, you bought out Mr. Joaquin A. Perez, did you not? A. Yes, sir.

Q. And you have the stock certificate, do you?

A. I believe it is in Mr. Crain's office.

Q. But it was delivered to you?

A. I believe it's still in Mr. Crain's office.

Q. And Mr. Perez was the manager of the company up until September 30, 1952?

A. Yes, your Honor.

Q. And you were the acting treasurer?

A. Yes, your Honor, by appointment by Mr. Perez.

Q. And you received \$350 a month?

A. \$325 to my memory.

Q. \$325—what did you do for the \$325 a month, Mr. Hines? A. I received that as my salary.

Q. And what did you do to earn it? I mean did you spend some time each day at the company?

A. I am taking charge of the cash.

Q. Of the deposits of the cash?

A. Yes, sir.

Q. Did you extend credit?

A. No, your Honor. [187]

Q. In other words, were the bookkeepers under your direction? A. No, your Honor.

Q. You just handled the cash, made the deposits and countersigned checks?

A. Yes, your Honor.

(Testimony of Cristobal C. Hines.)

Q. You had nothing to do with ordering or payment, except to sign the checks?

A. No, your Honor.

The Court: Very well. Thank you.

Mr. Turner: I might ask one question.

Re-recross-Examination

By Mr. Turner:

Q. You haven't paid Mr. Joaquin A. Perez any money or anything for his stock so far, have you?

A. Not yet.

Mr. Turner: That is all.

Mr. Crain: That is all. We rest, your Honor.

The Court: Now Mr. Turner.

Mr. Turner: Will you stipulate I can testify in narrative form?

Mr. Crain: Certainly.

MR. LYLE H. TURNER

counsel for plaintiff, was duly sworn and testified in rebuttal as follows: [188]

Direct Examination

Mr. Turner: To summarize and shorten the testimony, what Mr. Crain has stated that Mr. Lathrop and Mr. Forkner had been unable to select a third appraiser as late as the early spring of 1953 is correct. Mr. Crain, to my recollection, called me on the telephone and asked me whether I felt Mr. Hank Schwendinger would be acceptable as a third

(Testimony of Cristobal C. Hines.)

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(Testimony of Lyle H. Turner.)

appraiser, and to the best of my recollection, I stated that I would get in touch with Mr. Joaquin A. Perez and ascertain whether Mr. Schwendinger was acceptable. To the best of my recollection, Mr. Perez advised me that he would not be acceptable because he had business dealings with Mr. Forkner and he therefore questioned whether he would be disinterested. I therefore advised Mr. Crain that Mr. Schwendinger would be unacceptable and they would have to have a third appraiser under the contract. Subsequently Mr. Lathrop came to my office and stated that they had selected a third appraiser and I prepared the typed statement which has been presented as a plaintiff's exhibit and it was subsequently returned to me signed by both Mr. Lathrop and Mr. Forkner, designating Mr. Norris as a third appraiser. I have no recollection of ever receiving a copy of Mr. Schwendinger's appraisal, but I distinctly do remember returning the appraisal to Mr. Crain's office in about three weeks' time and telling him that Mr. Schwendinger was not acceptable as an appraiser. The communication was communicated [189] to him as soon as Mr. Perez advised me Mr. Schwendinger would be unacceptable and, as the record shows, it was prior to the actual appraisal.

Examination by the Court

Q. You do not believe you ever saw the appraisal?

A. I will state it as a positive fact.

(Testimony of Lyle H. Turner.)

Q. You heard Mr. Crain's testimony that he made out a list of equipment so that all the appraiser had to do was put his values in?

A. I thought that it was written in pencil, not a typewritten list.

Q. That is the question I am getting at, but your recollection is that you were not in agreement with Mr. Crain as to the appointment of Mr. Schwendinger?

A. Well, I would have to get Mr. Perez' consent to it. I did not feel I could bind him. At least it is not my custom to bind a client without getting approval of it.

Q. Even though your agreement is to the contrary? A. Well, you mean in the contract?

Q. The contract provides that it is discretionary with the two appraisers.

A. You mean as far as the attorneys go under the contract?

Q. Yes, is there any requirement in the contract that the client should agree to the selection of the third appraiser?

A. Oh, no, the third appraiser under the contract was to be [190] selected by the two. To deviate from that I felt would be a breach of contract and I would have to get Mr. Perez' approval as to any substitution.

Q. In other words, if the two appraisers had made the selection there would have been no question but since the appointment of Mr. Schwending-

(Testimony of Lyle H. Turner.)

ger was at variance with the terms of the contract, you felt you had to get Mr. Perez' approval?

A. That is right.

Cross-Examination

By Mr. Crain:

Q. Actually that is a question I was going to ask. We are not trying to reconstruct something that happened two and a half years ago. However, you stated that the letter of authorization signed by Mr. Forkner and Mr. Lathrop, selecting Mr. Norris as the third appraiser, was prepared by your office after——

A. No, Mr. Lathrop came to my office and said, "Mr. Forkner and I are in a position to select a third appraiser. Will you prepare a written letter of appointment."

Q. But I think you said, you previously testified that Norris was going to be the man?

A. No, I don't think—to the best of my recollection, I didn't know who they were going to appoint.

Q. Isn't it correct that from approximately October of 1952, until the late fall of 1953 that you were off the island [191] for protracted periods, that you were traveling considerably?

A. If I remember correctly, let's say, in the late fall—I went on vacation from about June to August, and I think I was pretty well back on the island for almost all of the time after that, but I do know that Lathrop and Forkner had difficulty in getting a third appraiser because there weren't too

(Testimony of Lyle H. Turner.)

many people in Guam that knew that particular business.

Q. Actually, Mr. Lathrop was traveling too?

A. He was going to Manila.

Q. I believe that Mr. Stevens came to your office in July, 1953, and from that time until Mr. Norris made his appraisal you were also off the island considerably.

A. I had gone on leave—I think Russ came in '52.

Q. Mr. Schwendinger was known to you as a dealer or a dealer's agent in the purchase and sale of equipment over a considerable period of time?

A. I had prepared Mr. Schwendinger's tax returns and I knew from information developed from that that he worked for the Ellis Company and dealt in surplus.

Q. Also at the time he made the appraisal I believe he was on loan to a client of yours, Micronesia Metal Company of Saipan?

A. I wouldn't know. The only time he was in the office was to consult on **income tax, that is all.**

Q. But you knew him to be competent? [192]

A. Oh, yes, I knew him to be in the surplus business.

Q. I believe that the testimony both of us have given here has been quite approximate as to exact dates and places?

A. I just merely know I felt that I did advise you that he was unacceptable to Mr. Perez prior to the actual taking of the appraisal, according to that

(Testimony of Lyle H. Turner.)

exhibit, but it's all approximate because we are both dealing with our recollections.

Q. It could have been written up several days after?

A. It doesn't look like it to me because that exhibit looks like something that was written out in the field because it's in rough pencil, and I think he signed it after he took it.

The Court: Do you have any idea, Mr. Crain, why this wasn't prepared on the form you said you made up?

Mr. Crain: The only reason I could say—we furnished him the form and he went ahead and copied the items with his figures after them.

Mr. Turner: On page 12 of the deposition he says it isn't his writing on there, that it was written down as he called the stuff off, the material off, when he made the appraisals. He called it off to somebody else who wrote it down.

The Court: He testified, of course, that he made the appraisal either the same day or within two days after he talked with you. Presumably that was one of the occasions when Mr. Turner was on the island? [193]

Mr. Crain: We hope so, or he was coming or going.

Mr. Turner: No, I was here because of that letter.

Mr. Crain: Well, my writing the letter wouldn't be conclusive that you were on the island.

The Court: Do you have further rebuttal?

(Testimony of Lyle H. Turner.)

Mr. Turner: No, that is all. I am renewing my objection to the deposition, and I think we submit the case.

The Court: I would like to have counsel prepared to argue this matter at 1:30.

Mr. Turner: We are submitting the case without argument unless your Honor wants it.

The Court: Well, I think we should have a discussion here unless you would rather stipulate or by stipulation meet with me in chambers?

Mr. Crain: I would prefer that.

The Court: I think there are a number of factors which we could take into consideration which do not deal exclusively with evidence.

Mr. Crain: Right.

The Court: So I will meet you in chambers at 1:30, it, of course, being understood that the purpose of that is an informal discussion and it is not binding upon either party.

Mr. Crain: Thank you, sir.

The Court: The Court will recess until 1:30 and this deposition, of course, has been introduced and accepted in [194] evidence.

(The court recessed at 11:55 a.m., October 25, 1955, and reconvened at 9:30 a.m., October 26, 1955.)

The Court: Both sides have rested in this case. Do counsel have any argument?

Mr. Turner: No, we submit the case without argument.

Mr. Crain: No, sir.

The Court: Very well. The evidence in this case shows that on the 29th day of September, 1952, there was in existence in Guam a corporation known as the Island Service Company, Inc. That corporation had issued 100 shares of stock, having a par value of \$600 per share. Plaintiff in this case was the owner of 25 shares of stock, and the defendant in this case desired to acquire the 25 shares, as a result of which the plaintiff and the defendant entered into an agreement dated September 29, 1952, setting forth the basis upon which payment would be made for the plaintiff's 25 shares. That agreement contemplated that both parties would select auditors who would make an audit of the corporate assets and that heavy equipment owned by the corporation should be appraised by independent appraisers; that after a figure was agreed upon payment would be made in accordance with the agreement. At the outset it should be pointed out that ordinarily an audit of the type contemplated and the required appraisals should have been completed three months after the agreement was entered into, but it was [195] permitted to extend over a much longer period of time. The Court is of the view and so holds that this delay was largely due to the failure of the auditor selected by the defendant, and under his control as an employee, to perform his share of the work in a reasonable period of time. The auditor selected by the plaintiff testified that his work was substan-

tially completed in a short while after he was requested to perform the work. The agreement provided that if there was no meeting of minds on the basis of the audits and appraisals, that counsel would attempt to resolve any difficulties. The agreement further provided that the determination of the auditors should be subjected to adjustments by a third and independent accountant. All of this was done although in part not strictly in accordance with the terms of the agreement. The agreement further contemplated that the matter should be presented to the Court on those points of disagreement, and in the pretrial order counsel stipulated that the entire agreement was in dispute, so the Court is faced with the responsibility for making a complete determination. If counsel will make notes, the Court finds the issues in this case joined in favor of the plaintiff and against the defendant. It finds that the balance sheet which was introduced as Plaintiff's Exhibit 6 and which was prepared by Mr. Wiseman, the accountant, correctly states the reconciliations or the agreements between the two auditors insofar as there was agreement. Current assets—the Court [196] accepts Mr. Kaneshiro's conclusion that the cash on hand was \$20,047.40. Notes receivable, which are not in dispute, in the amount of \$850. As to accounts receivable the Court has no acceptable evidence before it as to the collectibility of these accounts as of October 1, 1952 except the accounting practice used, which was to take the accounts receivable and set up a sizable reserve for bad debts. The setting up of this reserve appar-

ently was sound accounting practice and was agreed to by the two auditors. The Court therefore finds that the accounts receivable are \$53,548.74. The inventory of merchandise presents little dispute. The Court accepts Mr. Kaneshiro's figure of \$48,506.65, which is slightly less than Mr. Viray's figure. The inventory value of new cars is not in dispute, that figure being \$11,489.33. Now let us total that figure before we proceed. The Court gets a figure of \$134,442.12. Fixed assets consist of the buildings, the value of which is not in dispute, in the sum of \$21,616.59. The Court finds the value of the office equipment to be \$188.75 and the value of furniture and fixtures to be \$736.58. Aside from the accounts receivable, the principal item in dispute is the appraised value of the equipment. That appraisal, obviously, was to reflect market value. In all instances the appraisers considered market value in terms of their own experiences and their own interests. Market value is normally that amount which would be paid by a buyer dealing at arm's length to a seller also [197] dealing at arm's length. The Court must consider this value as of October 1, 1952. There are four appraisals. Mr. Forkner's in the amount of \$22,349; Mr. Lathrop's in the amount of \$41,036; Mr. Norris' in the amount of \$34,391 and Mr. Schwendinger's in the amount of \$11,329. Now the Court received Mr. Schwendinger's deposition in evidence but does not feel that his appraisal was based upon true market value. It was based exclusively upon the value to his company, assuming that all of the heavy equipment involved

was to be transported to the United States to be sold as useable equipment or as parts. Mr. Forkner is in the salvage business and so was Mr. Lathrop to some extent. The Court feels that, in accordance with the agreement, Mr. Norris' appraisal most nearly meets the test which the parties established in that he was selected by the first two appraisers, his appraisal was completely independent of their determinations; at no time was there a joint meeting or effort at reconciliation. The Court is not entitled to guess and it therefore finds that Mr. Norris' appraisals is the most nearly accurate of any of those made and is in accordance, substantially, with the agreement and therefore finds the value of the equipment at \$34,391. The Court therefore finds that total as \$56,932.92. Merchandise in transit is not in dispute but there is the \$400 dispute. The Court takes Mr. Kaneshiro's figures which are less because his audit is dated a day later. His lesser figure will therefore be reflected in part at least [198] in the increased cash on hand which the Court accepted; that is, \$34,489.64. The prepaid insurance, prepaid expenses and deposits are not in dispute. Those are, respectively, \$728.44, \$545.28, and \$1,700, or a total of \$2,973.72. In adding those figures of assets the Court gets the total figure of \$228,838.40.

Mr. Turner: I have 538.

The Court: You get what?

Mr. Turner: 228,538.

The Court: Check your totals—56,932.92; 134,442.12; 34,489.64; 2,973.72.

Mr. Turner: Oh, that is where my mistake was. Thank you. That is right.

The Court: \$222,838.40 representing the assets. Under notes payable there is a discrepancy between the two auditors of \$3,300. There was some evidence before the Court as to a note payable to the plaintiff which is in dispute. The Court does not therefore feel that it should consider that note for any purpose at this time since it represents a claim against the corporation and if valid, the plaintiff is at liberty to collect, so under liabilities current the Court accepts Mr. Viray's figure of \$13,659.15. Drafts payable—there is a discrepancy here but in view of the fact that some drafts may have been paid—I don't know—I will accept Mr. Kaneshiro's figure of \$41,369.67. Accounts payable are in agreement, \$4,697.11. Accrued items are in agreement in the amount of [199] \$2,228.17. As to current liabilities therefore the Court has a figure of \$61,954.10. Does that check?

Mr. Crain: I must have missed one.

The Court: 13,659.15; 41,369.67; 4,697.11; 2,228.17.

Mr. Crain: Oh, I am sorry; I see my error.

The Court: The reserve for income tax is not in dispute, \$10,903.79; capital stock, \$60,000. The court gets a figure of \$132,857.89.

Mr. Turner: That is 132,000?

The Court: 132,857.89. Is that correct?

Mr. Crain: Right.

Mr. Turner: That is right.

The Court: Deducting 132,857.89 from 228,-

838.40, the court gets an earned surplus of \$95,-980.51. Is that your figure, Mr. Turner?

Mr. Turner: Yes, sir.

The Court: Under the terms of the agreement the plaintiff is entitled to one-fourth of that amount, which the court has as \$23,995.12.

Mr. Turner: 99 what?

The Court: \$23,995.12. Have you checked on that?

Mr. Crain: I have checked.

The Court: Is that correct?

Mr. Turner: That is the figure I get.

The Court: \$23,995.12. In addition to which he is [200] entitled to the par value of his stock in the amount of \$15,000, or a total amount of \$38,995.12. Judgment will therefore be entered in favor of the plaintiff against the defendant in the amount of \$38,995.12. The question now confronting the court is as to whether paragraph 4 of the agreement is to be followed in connection with the payment of this judgment. Ordinarily there would be no question in the court's mind but that this agreement was entered into on the 29th day of September, 1952. and normally should have been consummated, even including litigation, within a year from that date, in which event under the terms of paragraph 3, the plaintiff would have received the full amount contemplated under paragraph 4 of the agreement. In other words, he normally would have been fully paid a year ago. Now the question which the court presents to counsel is whether judgment should be entered in this amount or whether a judgment

should be entered in compliance with paragraph 4. The court will first hear from the plaintiff.

Mr. Turner: Without presenting the court any particular authorities on the subject, I would off-hand feel that unless this defendant was found to be in breach of the contract that the judgment should be rendered for payment pursuant to the contract, but the point might well be fully researched.

The Court: Mr. Crain, what are your views?

Mr. Crain: The only comment that I would have would be that the judgment of the court now is the determination of the [201] actual value as was called for by the contract.

The Court: And an appropriate judgment.

Mr. Crain: Yes, that part of paragraph 4 which refers to the 12 payments doesn't set forth the fact that they were to be monthly.

The Court: For purposes of appeal I don't think it makes any difference as long as the judgment is entered. Judgment will be entered in accordance with paragraph 4 of the agreement on the basis of a payment of \$15,000 within 15 days from today.

Mr. Crain: From today, your honor, or from entry of the judgment?

The Court: Well, the clerk's notes will show a judgment entered. Formal judgment will simply reflect that and the amount of \$23,995.12 is then to be paid in 12 equal monthly installments beginning what time after the \$15,000 is paid?

Mr. Crain: 90 days.

Mr. Turner: 90 days.

The Court: 90 days. The plaintiff will prepare Findings of Fact, Conclusions of Law and settle with the defendant in 10 days and the plaintiff will also prepare a satisfactory judgment. Any further matters to come before the court?

The Clerk: No further matters, your honor.

The Court: The court will stand adjourned until tomorrow morning at 9:30 a.m.

(The court adjourned at 10:50 a.m., October 26, 1955.) [202]

District Court of Guam,
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place as set forth.

/s/ DOROTHY L. WILKINS,
Official Court Reporter.

[Title of District Court and Cause.]

Civil No. 27-55

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam, for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint—filed 4-19-55.

2. Stipulation—filed 5-11-55.
3. Notice of Motion to Dismiss—filed 5-31-55.
4. Stipulation—filed 7-8-55.
5. Answer—filed 7-18-55.
6. Pretrial Order—filed 8-30-55.
7. Notice of Taking Deposition—filed 10-1-55.
8. Bond for Costs on Appeal—filed 11-9-55.
9. Notice of Appeal—filed 11-9-55.
10. Motion for Settlement of Findings of Fact, Conclusion of Law and Judgment—filed 11-23-55.
11. Findings of Fact and Conclusions of Law—filed 12-16-55.
12. Judgment—filed 12-16-55.
13. Statement of Points—filed 12-23-55.
14. Designation of Record on Appeal—filed 12-23-55.
15. Certified copy of Supersedeas Bond—filed 12-23-55.
16. Ex Parte Order—filed 12-31-55.
17. Notice of Appeal—filed 1-3-56.
18. Bill of Costs—filed 1-5-55.
19. Writ of Execution with Marshal's return endorsed thereon—filed 1-11-56.
20. Notice of Motion—filed 1-16-56.
21. Designation of Record on Appeal—filed 1-16-56.
22. Statement of Points—filed 1-16-56.
23. Certified copy of clerk's Minutes.
24. Transcript of Proceedings.
25. Deposition of Walter Lathrop.
26. Deposition of Henry G. Schwendinger.

27. Plaintiff's Exhibits 1-5, inclusive, and 7-10, inclusive.

28. Defendant's Exhibits A and B.

are the original or certified copies of the documents filed in the above-entitled case.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 7th day of February, A.D. 1956.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed]: No. 15078. United States Court of Appeals for the Ninth Circuit. Cristobal C. Hines, Appellant, vs. Joaquin A. Perez, Appellee. Transcript of Record. Appeal for the District Court of Guam, Territory of Guam.

Filed: February 9, 1956.

Docketed: March 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15078

CRISTOBAL C. HINES,

Appellant,

vs.

JOAQUIN A. PEREZ,

Appellee.

STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

1. The court erred in refusing to dismiss this cause upon motion made and argued that the court was without jurisdiction of this cause.

2. The court erred in excluding the appraisal of equipment made by Henry D. Schwendinger.

3. The court erred in the measure of damages applied inasmuch as there had been no joint audit of the books of the corporation as required by the agreement relied upon by defendant-appellant.

4. The court erred in accepting the partial reconciliation of Sherwood Wiseman of the separate audits of Ireneo Viray and Stanley Kaneshiro where the agreement relied upon called for a complete reconciliation by a third auditor of the joint audit.

5. The court erred in ordering judgment to be entered by the clerk on October 26, 1955, when judgment was not docketed until December 16, 1955.

6. The court erred in ordering that its judgment entered on the 16th day of December, 1955, be entered nunc pro tunc as of the 14th day of November, 1955.

7. The court erred in entering its judgment on the 16th day December, 1955, when it had not yet settled or filed its findings of fact and conclusions of law in the cause, which findings of fact and conclusions of law were settled and filed on the 19th day of December, 1955.

8. The court erred in ordering that its findings of fact and conclusions of law filed by it on the 19th day of December, 1955, be entered nunc pro tunc as of the 14th day of November, 1955.

9. The court failed to make findings of fact sufficient to support its conclusions of law and judgment.

Dated: March 9th, 1956.

Respectfully submitted,

/s/ THOMAS M. JENKINS,
Attorney for Appellant.

[Endorsed]: Filed March 10, 1956.

